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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 173.

THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

J. B. COOK ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

FILED OCTOBER 6, 1892.

(15,163.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 27, 1895.

1 UNITED STATES OF AMERICA, }
State of Kansas. }

To the Honorable Albert H. Horton, chief justice of the supreme court of the State of Kansas:

Your petitioner, The Missouri, Kansas & Texas Railway Company, a citizen of Kansas, would respectfully represent that at the October sitting of the July term, A. D. 1891, of the said supreme court of the State of Kansas, in the suit of The Missouri, Kansas & Texas Railway Company *et al.*, plaintiffs, *vs.* J. B. Cook *et al.*, defendants, judgment was rendered against the plaintiffs, and that said judgment is rendered by the court of final appel-ate jurisdiction within and for said State.

Your petitioner further states that the proceedings in said suit so had involved the validity of a certain act of Congress entitled "An act granting lands to the State of Kansas to aid in the construction of a southern branch of the Union Pacific railway and telegraph from Fort Riley, Kansas, to Fort Smith, Arkansas," approved July 26, 1866, the defendant The Missouri, Kansas & Texas Railway Company, named in said act, claiming by virtue of said act of Congress a right of way two hundred feet in width was granted it over and through the public and reserved lands within the State of Kansas on the line of its route, and it further claims under and by virtue of said act of Congress it had the right after the filing of its map of definite location with the Sec'y of the Interior to relocate and change its line of location over said lands at any time before construction as its interest and the public convenience might require, and also your petitioner claims that in said relocation and change of its line of location over said land it obtained full title to a right of way two hundred feet in width to the same extent as if such right of way had been embraced in its map of definite location as originally filed, and the judgment of the supreme court of Kansas was against the validity of said grant and claim, as appears upon the certified record of said supreme court, herewith exhibited.

2 Your petitioner prays that upon inspection of the record it be granted a writ of error to the Supreme Court of the United States in said cause, in order that the error, if any, in the proceeding and judgment of said supreme court of Kansas may be corrected.

JAMES HAGERMAN AND
T. N. SEDGWICK,
Att'y- for Plaintiff- in Error.

3 [Endorsed:] 6259. M., K. & T. R'l'y Co. *et al. vs.* J. B. Cook *et al.* Petition for writ of error. Filed Nov. 7, 1891. C. J. Brown, clerk sup. court.

4 In the Supreme Court of the State of Kansas.

Be it remembered that on the 30th day of October, A. D. 1889, there was filed in the office of the clerk of the supreme court of the

State of Kansas a case made from the district court of Labette county, with petition in error attached thereto and waiver of the issuance and service of summons in error endorsed thereon, which are in the words and figures as follows, to wit:

5 In the Supreme Court of the State of Kansas.

Missouri, Kansas & Texas R'y Co., Missouri Pacific R'y Co., Plaintiffs in Error,
vs.
J. B. Cook, L. H. Printz, Defendants in Error. } 6259.

Petition in Error.

Comes now said Missouri, Kansas & Texas R'y Co., plaintiff in error, and complains of said J. B. Cook and L. H. Printz, defendants in error, and for its ground of complaint alleges and shows to the court that at the regular February, 1889, term of the district court of Labette county, Kansas, the defendants in error recovered a judgment by the consideration of said court against plaintiffs in error in a certain action then pending in said court, wherein said Missouri, Kansas and Texas R'y Co. and said Missouri Pacific R'y Co. were the plaintiffs and said J. B. Cook and L. H. Printz were the defendants. A copy of the record of the judgment and all proceedings therein, duly certified, is hereto attached, marked Exhibit "A," and made a part of this petition in error; and said plaintiff in error, The Missouri, Kansas and Texas R'y Co., alleges and shows to the court that there is error in said record and proceedings, in this, to wit:

1. That said district court erred in rendering a judgment for defendants.

2. That said district court erred in not rendering judgment in favor of the plaintiffs against the defendants.

3. That said district court erred in not sustaining plaintiffs' motion for a new trial.

4th. That said district court erred in overruling plaintiffs' motion for a new trial.

5. That said court erred in not granting plaintiffs new trial.

6. That said court erred in its conclusion of law that the defendants were entitled to judgment.

7. That said court erred in its conclusion of law that said plaintiffs were not entitled to judgment.

8. That said court erred in holding the evidence sufficient to entitle defendants to a judgment.

9. That said court erred in not finding the evidence insufficient to entitle defendants to a judgment.

10. That said court erred in rendering a judgment that is not supported by the evidence.

11. That said court erred in rendering a judgment for the defendants contrary to the evidence.

12. That said court erred in rendering a judgment for defendants contrary to law.

Wherefore plaintiffs pray that said judgment may be reversed and they be restored to all things lost thereby.

T. N. SEDGWICK,
Attorney for Pl'ff- in Error.

Filed October 30, 1889.

C. J. BROWN,
Clerk Supreme Court.
W.

6 STATE OF KANSAS, } ss:
County of Labette, }

In the District Court of said County.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY and THE MISSOURI PACIFIC RAILWAY COMPANY, Plaintiff-,
vs.
J. B. COOK and L. H. PRINTZ, Defendants.

Case made.

Be it remembered that heretofore, to wit, on the dates hereinafter mentioned, the following proceedings were had in the above cause:

On the 17th day of August, A. D. 1887, the plaintiffs filed their petition in the above court, of which the following is an exact copy, to wit:

In the District Court of Labette County, Kansas.

THE MISSOURI, KANSAS & TEXAS R. R. Co. and THE MISSOURI PACIFIC R. R. Co., Plaintiffs,
vs.
J. B. COOK and L. H. PRINTZ, Defendants.

Petition.

The Missouri, Kansas and Texas Railway Company is a corporation organized and incorporated under the laws of the State of Kansas, and the Missouri Pacific Railway Company is a corporation duly organized and incorporated under the laws of the State of Missouri.

These plaintiffs have a legal estate in and are entitled to the possession of the following-described real property, situated in said county of Labette, to wit:

Commencing on the north line of Main street, in the city of Chetopa, at a point fifty feet west of the centre of the main track of the said Missouri, Kansas and Texas Railway Company, thence north one hundred feet on a line paral-el with the center of the main track of said railway, thence west fifty feet, thence south on a line paral-el with the main line of said railway one hundred feet to the north line of said Main street, thence east along the north line of said Main street fifty feet to the place of beginning.

And the defendant unlawfully keeps these plaintiffs out of the possession thereof.

The plaintiffs therefore ask judgment for the possession of said property.

DAVID KELSO,
Att'y for Pl'ffs.

7 And afterward and in due time the defendants filed their answer, which is as follows:

THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY and THE MISSOURI PACIFIC RAILWAY COMPANY, Plaintiffs,
vs.
J. B. COOK and L. H. PRINTZ, Defendants.

Answer.

The defendants, J. B. Cook and L. H. Printz, for their joint answer to the petition of the plaintiffs filed herein, deny that said plaintiffs have a legal estate in and are entitled to the possession of the real estate described in their petition, situated and being in Labette county, Kansas, to wit: Commencing on the north line of Main street, in the city of Chetopa, at a point fifty feet west of the center of the main track of the Missouri, Kansas and Texas Railway Company, thence north one hundred feet on a line parallel with the main line of said railway, thence west fifty feet, thence south on a line parallel with the main line of said railway one hundred feet to the north line of Main street, thence east along the line of said Main street fifty feet to the place of beginning, and deny that they unlawfully keep plaintiffs out of the possession thereof.

LEROY NEALE & SON AND
CASE AND GLASSE,
Attorneys for Defendants.

And thereupon the said plaintiffs and the said defendants made and filed herein a written stipulation as to all the facts in this cause; which said stipulation was filed in this cause prior to the trial hereof and in the words and figures as follows, to wit:

In the District Court of Labette County, Kansas.

THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY and THE MISSOURI PACIFIC RAILWAY COMPANY, Plaintiffs,
vs.
J. B. COOK and L. H. PRINTZ, Defendants.

It is hereby stipulated and agreed that upon the trial of the above-entitled action the following facts shall be admitted:

1. The Missouri, Kansas and Texas Railway Company was on the 25th day of September, 1865, duly organized as a corporation under the name of the Union Pacific Railway Company, Southern branch, and on the 3rd day of February, A. D. 1870, its name was

duly changed and made the Missouri, Kansas and Texas Railway Company, and it is the railway company referred to in the act of

8 Congress approved July 26th, 1866, entitled An act granting lands to the State of Kansas to aid in the construction of a southern branch of the Union Pacific railway and telegraph from Fort Riley, Kansas, to Fort Smith, Arkansas.

2. The acceptance of the terms, conditions, and impositions of said act by the said Union Pacific Railway Company, Southern branch, was signified in writing, under the corporate seal of said company, duly executed pursuant to the direction of its board of directors first had and obtained, which acceptance was made and deposited with the Secretary of the Interior within one year after the passage of said act.

3. The land in the petition described is a part of the lands known as the Osage ceded lands granted to the United States by the treaty between the United States of American and the Great and Little Osage Indians proclaimed January 21st, 1867.

4. Prior to the 24th day of December, 1867, a line was surveyed for the rout- of said railroad by G. M. Walker, then chief engineer of said company, which was the line from which the lands mentioned in stipulation No. 7 herein were withdrawn from market, but that line did not touch the southwest quarter of section thirty-four (34), township thirty-four (34), range twenty-one (21), which includes the land described in plaintiffs' petition in this case, and afterwards and between May 1st, 1870, and June 6th, 1870, said company located its road on the line where now operated, and built same in substantial compliance with said act of Congress, but the route of said road on its present location has never been approved by the President of the United States, unless such approval is shown by the other facts herein admitted.

5. The premises in plaintiffs' petition demanded lie wholly within one hundred feet of the center line of the main track of the railway so built and constructed as aforesaid, the center line of said main track being the center of the right of way of — railroad company.

6. On the first day of December, 1880, the said Missouri, Kansas and Texas Railway Company leased said railway to said Missouri Pacific Railway Company, which has since possessed and operated the same as such lessee.

7. Upon the completion of said railway through said Osage ceded land the President of the United States issued to said Missouri, Kansas and Texas Railway Company patents under said act of Congress, approved July 26, 1866, for the alternate sections of land designated by odd numbers to the extent of five alternate sections per mile on each side of said railroad, which are the same patents set aside in the case of The Missouri, Kansas and Texas Railway Company *vs.* The United States, reported in 92 U. S. Reports.

8. The quarter section, including the land in question, was entered and purchased by one W. A. Hodges from the Government of the United States on October 9, 1869, and a certificate in due form was on that day, by the proper officers, issued to him therefore, and thereafter and on November 1st, 1870, a patent in due form was issued

therefore pursuant to the said entry by the Government of the United States to said patentee, Hodges, which was duly signed and executed, and a perfect chain of title from said Hodges, patentee, now runs to and terminates in said defendant, J. B. Cook, and he is the owner thereof unless the same is owned by plaintiffs by virtue of the facts herein admitted and the law governing the same Defendant Printz is in possession of the premises in controversy as the tenant of defendant Cook.

9. None of the land in dispute lies within fifty feet of the 9 line of the center of the main track of said railroad, nor does defendant claim any part of the strip of land within fifty feet on either side of the center of said track.

The plaintiff, at the time of constructing said road, erected a depot building on its right of way, and the land on which said building stands is adjacent to the land in dispute, which said depot has been used all the time since its erection for the purpose of receiving freight and passengers for shipment, nor does defendant claim any ground on which any side tracks of said railroad are now located.

DAVID KELSO,
Attorneys for Plaintiffs.
LEROY NEAL & SON AND
CASE AND GLASSE,
Attorneys for Defendants.

Thereafter and on the 15th day of October, at the regular October term of the district court for said county, said cause was argued in the court by counsel for both sides upon the agreed statement of facts above set forth, which were all the facts proven or offered to be proven by either party in said cause, and the same was thereupon at said time submitted to the court upon said agreed statement of facts, and thereafter and on the 7th day of March, 1889, the court announced its finding in favor of the defendants and against the plaintiffs, judgment according to which *judgment* is as follows:

THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY and The Missouri Pacific Railway Company, Plaintiffs,
vs.
J. B. COOK and L. H. PRINTZ, Defendants.
No. 3607.

Now, on this 15th day of October, A. D. 1887, this cause being called for trial, the plaintiffs appeared by David Kelso, their attorney, and the defendant- appeared by their attorneys, Leroy, Neale & Son. A jury being waived, the cause was submitted to the court for trial and determination, and, after being fully advised in the premises, the court finds the issues joined herein in favor of the defendants and against the plaintiffs.

Therefore it is by the court considered, ordered, and adjudged that said defendants have and recover of and from said plaintiffs the costs of this action, taxed at $——, for which execution is

awarded. This being an action of ejectment, thereupon the plaintiffs demand on the journal another trial herein. Thereupon it is by the court considered, ordered, and adjudged that said judgment be set aside and another trial awarded herein, and that this cause be continued to the next term of this court for that purpose, and thereafter said cause came on regularly to be heard at the March term, 1889, of said court for a second trial thereof. Jury waived and cause submitted to the court for trial and determination; whereupon the court, being fully advised in the premises, found as hereinafter set out, and so rendered judgment.

And thereupon the plaintiff filed a motion for a *motion* in the words following, to wit:

STATE OF KANSAS, }
County of Labette, } *ss*:

In the District Court of said County.

THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY, Plaintiff,
vs.
J. B. COOK *et al.*, Defendants.

Motion for New Trial.

Comes now the plaintiff in the above-entitled cause and moves the court to grant it a new trial upon the ground and for the following reasons, to wit:

1st. Irregularity on the part of the court by which plaintiff was prevented from having a fair trial.

2nd. The finding and judgment of the court is not sustained by the evidence.

3rd. The finding and judgment of the court is against the evidence and contrary to it.

4th. The finding and judgment of the court is contrary to law.

5th. Error of law occurring at the trial and at the time excepted to by the plaintiff.

T. N. SEDGWICK,
Attorney for Plaintiff.

Which said motion was overruled by the court; to which ruling of the court the plaintiffs at the time duly excepted, and thereupon and on the said 7th day of March, 1889, the court rendered its judgment in said cause in favor of the defendants and caused the same to be entered on the journal of the court as follows, to wit:

THE MISSOURI, KANSAS AND TEXAS RAILWAY Company and The Missouri Pacific Railway Company
vs.
J. B. COOK *et al.*
Journal Entry.

And now, on this 7th day of March, 1889, at the regular February, 1889, term of this court, the above cause coming on for hearing

upon an agreed statement of facts, this being the second trial of this cause, the plaintiff appeared by T. N. Sedgwick, its attorney, and the defendants by Leroy Neal and Son and Case and Glass, their attorneys, and the court, being fully advised in the premises, finds generally in favor of the defendants and against the plaintiff.

It is thereupon considered, ordered, and adjudged by the court that the defendants do have and recover of and from the plaintiff herein their costs herein expended, taxed $30.40, and hereof let execution issue; and plaintiffs asked and obtained 30 days in which to make and serve a case made upon defendants, and defendants are allowed 10 days in which to suggest amendment, and the case to be settled and signed within 10 days thereafter.

The above and foregoing are all the proceedings had in said cause, and the above statement of facts was all the facts presented to the court in this case.

The above and foregoing case made was served upon us by the plaintiffs on this 3rd day of April, A. D. 1889.

CASE & GLASSE,
Att'ys for Defendants.

11 We have no amendments to suggest to this case made as it now appears, and we hereby waive notice of the time and place for presenting the same for settlement.

CASE & GLASSE,
Att'ys for Defendants.

Oswego, Kas., April 15, 1889.

STATE OF KANSAS, }
County of ——. }

And now, on this 17th day of April, the plaintiffs appeared by T. N. Sedgwick, its general attorney, and the defendants appeared by Leroy Neal and Son and Case and Glass, their attorneys, and the plaintiff presented the above and foregoing as its case made in the above-entitled cause and asked to have the same signed and allowed as correct; and it appearing to me that the same was duly served upon the defendants within the time given the plaintiff by the court in which to make and serve said case made, and it further appearing to the court by the admission of the defendants that said case made is correct, and that said defendants have no amendment thereto to suggest, and it further appearing to the court from an examination of the said case made that the same is correct, it is thereupon considered and ordered that said case made be, and the same hereby is, allowed and by me signed as correct.

It is further considered and ordered that the same be attested by the clerk with his seal and by him filed in his office with the original papers in said cause.

In witness whereof I have hereunto set my hand the day and year last above mentioned.

GEO. CHANDLER, *Judge.*

Attest:
[SEAL.]

COLIN HODGE,
Clerk of the District Court of Labette County, Kansas.

6259. The M., K. & T. R'y Co. *et al. vs.* J. B. Cook *et al.* Case made. Filed June 20th, 1889. Colin Hodge, clerk dist. court. Filed October 30, 1889. C. J. Brown, clerk supreme court.

12 And afterwards, on, to wit, the 10th day of April, 1891, the same being one of the regular judicial days of the January term, A. D. 1891, of the supreme court of the State of Kansas, before said court, in session at the supreme court room, in the city of Topeka—present, Honorable Albert H. Horton, chief justice; Honorable William A. Johnston and Honorable Daniel M. Valentine, associate justices, and C. J. Brown, clerk of said court—the following proceeding, among others, was had and entered of record as follows, to wit:

THE M., K. & T. R'L'Y CO., Plaintiff in Error,
vs.
J. B. COOK *et al.*, Defendants in Error.

This cause comes on to be heard on the petition in error and the transcript of the record of the district court of Labette county; and thereupon said cause was submitted on brief of counsel for both parties herein and taken under advisement by the court.

13 And afterwards and on, to wit, the 9th day of May, 1891, the same being one of the regular judicial days of the January term, A. D. 1891, of the supreme court of the State of Kansas, before said court, in session at the supreme court room, in the city of Topeka—present, Honorable Albert H. Horton, chief justice; Honorable Daniel M. Valentine and Honorable William A. Johnston, associate justices, and C. J. Brown, clerk of said court—the following proceeding, among others, was had and remains of record as follows, to wit:

THE MISSOURI PACIFIC RAILWAY COMPANY *et al.*, Plaintiffs in Error,
—
J. B. COOK and L. H. PRINTZ, Defendants in Error.

This cause comes on for decision and thereupon it is ordered and adjudged that the judgment of the court below be affirmed.

It is further ordered that the plaintiffs in error pay the costs of this case in this court, taxed at $——, and hereof let execution issue.

14 And also on, to wit, the 9th day of May, 1891, the same being one of the regular judicial days of the January term, A. D. 1891, of the supreme court of the State of Kansas, there was filed in the office of the clerk of said court the syllabus and opinion of the court in said cause, a copy of which is hereto attached and is in the words and figures as follows, to wit:

15 THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY and The Missouri Pacific Railway Company
vs.
J. B. COOK and L. H. PRINTZ. } 6259.

Error from Labette county affirmed.

Syllabus by the Court, Strang, C.

By act of Congress of July 26th, 1866, the Union Pacific Railway Company, Southern branch, afterwards the M., K. & T. Railway Company, received a grant of right of way for its road 200 feet wide through the reserved and ceded lands of the Government. Prior to December 24th, 1867, the latter company surveyed its line of road and filed its map designating its route with the Secretary of the Interior.

October 9th, 1869, one Hodges, one of the grantors of the defendant J. B. Cook purchased of the Government the land in dispute.

Afterwards, in May and June, 1870, the railway company changed the line of its road and built it across the land in dispute, the original location not having touched the quarter section to which the land in question belongs; held that by the survey of its line and the filing of its map designating the route of its road the company exercised its right under its grant and could not reclaim it two years and a half afterwards on changing its line of road so as to affect the rights of Hodges or his grantees.

All the justices concurring.

A true copy.
Attest:

[Seal Supreme Court, State of Kansas.]

C. J. BROWN,
Clerk Supreme Court.

16 THE MISSOURI, KANSAS AND TEXAS RAILWAY Company and The Missouri Pacific Railway Company
v.
J. B. COOK and L. H. PRINTZ. } No. 6259.

Error from Labette county affirmed.

Opinion by Strang, C.

Action of ejectment to recover possession of the following-described real property, situated in Labette county, Kansas, to wit: Commencing on the north line of Main street, in the city of Chetopa, at a point 50 feet west of the center of the main track of the Missouri, Kansas and Texas railway, thence north 100 feet on a — parallel with the center of the main track of said railway, thence west 50 feet, thence south on a line parallel with the main line of said railway 100 feet to the north line of Main street, thence east along

the north line of Main street to the place of beginning, being a portion of the land claimed by the plaintiffs as a right of way in the city of Chetopa. The defendants filed a joint answer, denying that the plaintiffs had any legal estate in the land described or a right to recover the possession thereof. The case was tried by the court without a jury on the following-agreed statement of facts:

"It is hereby stipulated and agreed that upon the trial of the above-entitled action the following facts shall be admitted:

1. The Missouri, Kansas and Texas Railway Company was on the 25th day of September, 1865, duly organized as a corporation under the name of the Union Pacific Railway Company, Southern branch, and on the 3rd day of February, A. D. 1870, its name was duly changed and made the Missouri, Kansas and Texas Railway Company, and it is the railway company referred to in the act of Congress approved July 26th, 1866, entitled An act granting lands to the State of Kansas to aid in the construction of a southern branch of the Union Pacific railway and telegraph from Fort Riley, Kansas, to Fort Smith, Arkansas.

17 2. The acceptance of the terms, conditions, and impositions of said act by the said Union Pacific Railway Company, Southern branch, was signified in writing under the corporate seal of said company, duly executed pursuant to the direction of its board of directors first had and obtained, which acceptance was made and deposited with the Secretary of the Interior within one year after the passage of this act.

3. The land in the petition described is a part of the lands known as the Osage ceded lands, granted to the United States by the treaty between the United States of America and the Great and Little Osage Indians, proclaimed January 21st, 1867.

4. Prior to the 24th day of December, 1867, a line was surveyed for the route of said railroad by G. M. Walker, then chief engineer of said company, which was the line from which the lands mentioned in stipulation No. 7 herein were withdrawn from the market, but that line did not touch the southwest quarter of section thirty-four, township thirty-four (34), range twenty-one (21), which includes the land described in plaintiffs' petition in said case; and afterwards and between May 1st, 1870, and June 6th, 1870, said company located its road on the line where now operated and built same in substantial compliance with said act of Congress, but the route of said road on its present location has never been approved by the President of the United States unless such approval is shown by the other facts herein admitted.

5. The premises in plaintiffs' petition demanded lie wholly within one hundred feet of the center line of the main track of the railway so built and constructed as aforesaid, the center line of said main track being the center of the right of way of railway company.

6. On the 1st day of September, 1880, the said Missouri, Kansas and Texas Railway Company leased said railway to said Missouri Pacific Railway Company, which has since possessed and operated the same as such lessee.

7. Upon the completion of said railway through said Osage ceded

land the President of the United States issued to said Missouri, Kansas and Texas Railway Company patents under said act of Congress approved July 26th, 1866, for the alternate sections of land designated by odd numbers to the extent of five alternate sections per mile on each side of said railroad, which are the same patents set aside in the case of The Missouri, Kansas and Texas Railway Company *v.* The United States, reported in 92 U. S Reports.

8. The quarter section including the land in question was entered and purchased by one W. A. Hodge from the Government of the United States on October 9th, 1869, and a certificate in due form was on that day by the proper officers issued to him therefor, and thereafter and on November 1st, 1870, a patent in due form was issued therefor pursuant to the said entry by the Government of the United States to said patentee, Hodges, which was duly signed and executed, and a perfect chain of title from said Hodges, patentee, now runs to and terminates in said defendant, J. B. Cook, and he is the owner thereof unless the same is owned by the plaintiffs
18 by virtue of the facts herein admitted and the law governing the same, except Printz is in possession of the premises in controversy as the tenant of defendant Cook.

9. None of the land in dispute lies within fifty feet of the line of the center of the main track of said railroad, nor does defendant claim any part of the strip of land within fifty feet of either side of the center of said track.

The plaintiff at the time of constructing said road erected a depot building on its right of way, and the land on which said building stands is adjacent to the land in dispute; which said depot has been used all the time since its erection for the purpose of receiving freight and passengers for shipment.

Nor does defendant claim any ground on which any side tracks of said railroad are now located."

On the facts as above set forth the court found for the defendants and entered judgment accordingly. Motion for new trial was overruled. The plaintiffs demanded on the journal another trial.

The first judgment was set aside and another trial was had on the same facts, and a second judgment for the defendants was entered, followed by another motion for new trial, which was overruled.

The claim of the plaintiffs to the land in dispute is based upon a right-of-way grant contained in an act of Congress of July 26th, 1866. The first section of said act gives the railroad company named therein a right of way through the reserved and ceded lands of the Government 200 feet wide, while by the sixth section the road is granted a right of way through the public lands only 100 feet wide. The land in question was a part of the lands reserved for the Osage Indians at the time of the passage of the act under which plaintiffs' claim is made, but were ceded to the Government January 21st, 1867.

The plaintiffs claim that the grant to the company of the right of way was a present grant and took effect immediately upon passage of the act. We agree with the counsel for the plaintiffs that
19 the grant was a present one, and that so far as the grant

itself is concerned or the right of the company to locate and have a right of way for its road 200 feet wide through reserved or ceded lands it took effect immediately; but we understand that until the grantee exercises the right secured by the act by definitely locating its road the grant is a float, and while the grantee has a vested right in the grant to the extent of a right to locate its road and claim 200 feet for its right of way through reserved or ceded lands such right does not attach to any particular tract of land until the road is located, and to that extent and in that sense the grantee has no vested right in any particular piece of land for a right of way until the road is definitely located. The grantee has a vested right, a fixed and indefeasible right, from the passage of the act to a strip of land 200 feet wide through the reserved and ceded lands of the Government for a right of way, which shall take effect and attach to the land on the location of its road, but no vested right in any particular piece of land until the location of its road.

When, however, the location is made and the grant attaches, it relates back to the inception of the grant, the passage of the act containing it.

We also understand that when the grantee elects to attach his grant to any particular tract of land by the definite location of its road it has claimed its grant and exhausted its right thereunder and cannot reclaim it elsewhere.

"This case stands thus: The corporators had the power to locate and construct a railroad. They could exercise this right but once without further grant. To accomplish this object a most important attribute of sovereignty was bestowed on them by the legislature—the extraordinary reserve power of subjecting the property of private individuals to public use. If it were intended that this should be a continuing power, one that might be exercised and again re-exercised again and again as often as might suit the convenience of this company, the legislature should have so declared in express terms. They have not done so."

Moorhead *v.* Little Miami R. R. Co., 17 Ohio, 351.

This extent of country is not all appropriated to the use of the road, but only so much as may be necessary for a track. Its right to it is simply one of selection, and when it has made its selection its right over all the other territory ceases.

This principal is distinctly decided in the case of Moorhead *v.* The Little Miami R. R. Co.; Little Miami R. R. Co. *v.* Naylor, 2 Ohio State, 238.

When did the plaintiffs definitely locate their road so that their grant of the right of way attached? They claim they located it when they built it where it now is, in 1870, and not before, while the defendants claim the company definitely located its road prior to December 24th, 1867, on the Walker survey, which location did not touch the quarter section of land to which the piece in dispute belonged. We are of the opinion that the defendants are right in their contention that the company definitely located the line of its road prior to December 24th, 1867, and that by so doing it exhausted

its rights under the grant contained in the act of July 26th, 1866, at any rate so far as the intervening adverse rights of third parties are concerned, and, as the defendant Cook's grantors purchased the land after the 24th of December, 1867, and before May, 1870,
21 to wit, October 9th, 1869, he had rights in the land prior to 1870 that could not be affected by the relocation of the plaintiffs' road. The survey of the plaintiffs' road by Walker was followed by the company filing a map with the Secretary of the Interior showing the route of their road and asking that the lands along its line thus established be withdrawn from the market until the company had selected its lands.

This, we think, constituted a definite location of its road by the company and an exercise of its grant, and when thereafter it changed its route its location was subject to the rights before then obtained by Hodges in the land in dispute.

The fourth section of the act of July 26th, 1866, among other things states "that as soon as said company shall file with the Secretary of the Interior maps of its line describing the route thereof it shall be the duty of the Secretary to withdraw from the market the land granted by this act."

This section confers upon the grantee the right to file with the Interior Department a map describing the route of its road and made it the duty of the Secretary of said department when said map was filed to withdraw from the market the lands granted by the act.

It is said by the plaintiff that the only object in filing the map was to secure the withdrawal of the lands granted by the act, and that filing of the map had nothing to do with the right of way.

It is true the withdrawal of the lands granted was the object to be attained by the filing of the map, but it is also true that that object could not be obtained except by filing the map as evidence of the location of the line of road, and the company, having filed it as evidence of the location of their road for that purpose,
22 cannot afterwards and after it has secured that purpose say that it is not evidence of the location of their road for the purpose of enabling it to relocate its right of way.

We are of the opinion that the position of the claimant is the correct one. The route must be considered as definitely fixed when it has ceased to be the subject of change at the volition of the company. Until the map is filed with the Secretary of the Interior the company is at liberty to adopt such a route as it may deem best after an examination of the ground has disclosed the feasibility and advantages of the different lines; but when a route is adopted by the company and a map designating it is filed by the company with the Secretary of the Interior and accepted by that officer the route is established; it is, in the language of the act, "definitely fixed," and cannot be the subject of future change so as to affect the grant except on legislative consent. No further action of the company is required to establish the route. Van Wyck *v.* Knevals, 106 U. S., 360.

For we are of the opinion that under this grant, as under many

other grants containing the same words or words to same purport, the act which fixes the time of the definite location is the act of filing the map or plat of the line in the office of the Commissioner of the General Land Office. * * * Until then many rights to the lands along which the road finally runs may attach, which will be paramount to that of the company building the road. After this no such right can attach, because the right of the company becomes by that act vested. * * * It selects for itself the precise line on which the road is to be built, and it is by law bound to report its action by filing its map with the Commissioner or, rather, 23 in his office. The line is then fixed. The company cannot alter it so as to affect the rights of any other party. R'l'y Co. *v.* Dunmeyer, 113 U. S., 629.

Without looking into the question raised by the statute of limitations, we recommend that the judgment of the district court be affirmed.

By the COURT: It is so ordered.

All the justices concurring.

A true copy. Attest:

[Seal Supreme Court, State of Kansas.]

C. J. BROWN,
Clerk Supreme Court.

24 And afterwards and on, to wit, the 10th day of October, 1891, the same being one of the regular judicial days of the July term, A. D. 1891, of the supreme court of the State of Kansas, before said court, in session at the supreme court room, in the city of Topeka—present, Honorable Albert H. Horton, chief justice; Honorable Daniel M. Valentine and Honorable William A. Johnston, associate justices, and C. J. Brown, clerk of said court—the following proceeding, among others, was had and entered of record as follows, to wit:

THE M., K. & T. R'L'Y CO. *et al.*, Plaintiffs in Error,
vs.
J. B. COOK *et al.*, Defendants in Error.

Now comes on for decision the motion for a rehearing of this cause, and thereupon it is ordered that said motion be overruled.

24½ And afterwards, on, to wit, the 7th day of November, 1891, there was filed in the office of the clerk of the supreme court of the State of Kansas a writ of error in the above-entitled cause, the original of which is hereunto attached and is in the words and figures as follows, to wit:

25 THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY *et al.*, Plaintiff- in Error,
vs.
J. B. COOK *et al.*, Defendant- in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the honorable the judges of the supreme court of Kansas:

Because — the records and proceedings, and also in the rendition of the judgment which is in the said supreme court of the State of Kansas, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between J. B. Cook *et al.* and The Missouri, Kansas & Texas Railway Company *et al.*, wherein was drawn in question the validity of an act of Congress entitled "An act granting lands to the State of Kansas to aid in the construction of a southern branch of the Union Pacific railway and telegraph from Fort Riley, Kansas, to Fort Smith, Arkansas"—

The decision was that such act was invalid as a grant of a right of way two hundred feet wide to the said Missouri, Kansas & Texas Railway Company over the land embraced within the said Osage reservation, in this, that under said act the said Missouri, Kansas & Texas Railway Company did not have the right to relocate and change its route as its interest and the public convenience might require after filing its map of definite location with the Sec'y of the Interior, and also that in said relocation and change of its line of location over said land it obtained no title to a right of way two hundred feet in width, a manifest error hath happened, to the great damage of the said The Missouri, Kansas & Texas Railway
26 Company, as by its complaint appears, we, being willing that the error, if any hath been, *to* be duly corrected and full and speedy justice done to parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with the writ, so that you may have the same at Washington on the second Monday of October next, in the Supreme Court to be then and there held, that, the record of proceedings being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court, this 7th day of Nov., in the year of our Lord one thousand eight hundred and ninety-one.

GEO. F. SHARITT,

{ The Seal of the Circuit Court of the United States, District of Kansas, 1862. }

Clerk of the Circuit Court of the United States for the District of Kansas.

Allowed and approved this 7th day of Nov., A. D. 1891.

ALBERT H. HORTON,
Chief Justice of the Supreme Court of the State of Kansas.

27 [Endorsed:] M., K. and T. R'l'y Co. *et al. vs.* J. B. Cook *et al.* Writ of error. Filed Nov. 7, 1891. C. J. Brown, clerk sup. court.

28 And afterwards, to wit, on the 16th day of November, A. D. 1891, there was filed in the office of the clerk of the supreme court of the State of Kansas a citation in the above-entitled cause, the original of which, with the endorsements thereon, is hereunto attached and is in words and figures as follows, to wit:

29 The United States of America to J. B. Cook *et al.*, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Kansas, wherein The Missouri, Kansas & Texas Railway Company *et al.* are plaintiffs in error and J. B. Cook *et al.* are defendants in error, to show cause, if any there be, why the judgment rendered against the plaintiff- in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Albert H. Horton, chief justice of the supreme court of the State of Kansas, this 7 day of Nov., 1891.

ALBERT H. HORTON.

Service of the within citation upon the undersigned is hereby acknowledged this 10th day of November, 1891.

CASE & GLASSE,
Attorneys for Defendant in Error.

The Missouri, Kansas & Texas Railway Company *et al.*, plaintiffs in error, *vs.* J. B. Cook *et al.*, defendants in error. Citation.

30 [Endorsed:] Citation. Filed Nov. 16, 1891. C. J. Brown, clerk sup. court.

31 And also, on, to wit, the 7th day of November, A. D. 1891, there was filed in the office of the clerk of the supreme court of the State of Kansas an appeal bond in the above-entitled cause; which said bond is in words and figures as follows, to wit:

In the Supreme Court of the State of Kansas.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY *et al.*, Plaintiff- in Error,

vs.

J. B. COOK *et al.*, Defendant- in Error.

Know all men by these presents that we, C. S. Cross, H. C. Whitley, and William Martindale, are held and firmly bound unto

the defendant in error, J. B. Cook *et al.*, in the sum of five thousand ($5,000.00) dollars, to be paid to him; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this — day of November, 1891.

Whereas the above-named Missouri, Kansas & Texas Railway Company hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the supreme court of the State of Kansas:

Now, therefore, the condition of this obligation is such that if the above-named The Missouri, Kansas & Texas Railway Company shall prosecute its said writ of error to effect and answer all costs if it so fail to make good its allegation of error, then this obligation to be void; otherwise to remain in full force and virtue.

C. S. CROSS.
H. C. WHITLEY.

Approved by me this 7th day of November, 1891.

ALBERT H. HORTON,
Chief Justice of the Supreme Court.

32 In the Supreme Court of the State of Kansas.

I, C. J. Brown, clerk of the supreme court of the State of Kansas, do hereby certify that the above and foregoing is a full, correct, and complete transcript of all pleadings and papers filed and of all proceedings had in the above-entitled cause as the same remain on file and of record in my office.

Witness my hand and the seal of the supreme court affixed hereto, at my office, in Topeka, this 28th day of June, A. D. 1892.

[Seal Supreme Court, State of Kansas.]

C. J. BROWN,
Clerk Supreme Court.

Endorsed on cover: Case No. 15,163. Kansas supreme court. Term No., 173. The Missouri, Kansas & Texas Railway Company, plaintiff in error, *vs.* J. B. Cook *et al.* Filed October 6th, 1892.

FILED.
JAN 17 1896
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1895.

No. 173.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, PLAINTIFF IN ERROR.

vs.

J. B. COOK AND OTHERS, DEFENDANTS IN ERROR.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

JAMES HAGERMAN
AND T. N. SEDGWICK,
Attorneys for Plaintiff in Error.

The Foley Printing Co., Parsons, Kansas.

the defendants in error, J. B. Cook *et al.*, in the sum of five thousand ($5,000.00) dollars, to be paid to him; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this — day of November, 1891.

Whereas the above-named Missouri, Kansas & Texas Railway Company hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the supreme court of the State of Kansas;

Now, therefore, the condition of this obligation is such that if the above-named The Missouri, Kansas & Texas Railway Company shall prosecute its said writ of error to effect and answer all costs if it so fail to make good its allegation of error, then this obligation to be void; otherwise to remain in full force and virtue.

C. S. CROSS.
H. C. WHITLEY.

Approved by me this 7th day of November, 1891.

ALBERT H. HORTON,
Chief Justice of the Supreme Court.

32 In the Supreme Court of the State of Kansas.

I, C. J. Brown, clerk of the supreme court of the State of Kansas, do hereby certify that the above and foregoing is a full, correct, and complete transcript of all pleadings and papers filed and of all proceedings had in the above-entitled cause as the same remain on file and of record in my office.

Witness my hand and the seal of the supreme court affixed hereto, at my office, in Topeka, this 28th day of June, A. D. 1892.

[Seal Supreme Court, State of Kansas.]

C. J. BROWN,
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Supreme Court of the United States

OCTOBER TERM, 1895.

No. 173.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

J. B. COOK AND OTHERS, DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

STATEMENT OF FACTS.

This is an action of ejectment by the Missouri, Kansas & Texas Railway Company to recover possession of the following described real property situated in the city of Chetopa, in Labette County, Kansas, to-wit:

Commencing at the North line of Main street in the city of Chetopa, at a point 50 feet west of the center of the main track of the Missouri, Kansas & Texas Railway, thence north 100 feet on a line parallel with the center of the main track of said railway, thence west 50 feet, thence south on a line parallel with the main track of said railway 100 feet to the north line of Main street, thence east to the place of beginning, being a portion of the land

claimed by the plaintiff as right of way in and through the city of Chetopa.

(See petition of plaintiff on page 3 of the record.)

The facts are agreed upon, and the agreement with reference thereto, is as follows, to-wit:

Omitting title.

It is hereby stipulated and agreed that upon the trial of the above entitled action, the following facts shall be admitted:

1. The Missouri, Kansas & Texas Railway Company was on the 25th day of September, 1865, duly organized as a corporation, under the name of the Union Pacific Railway Company, Southern Branch, and on the 3rd day of February, A. D. 1870, its name was duly changed and made the Missouri, Kansas & Texas Railway Company, and it is the railway company referred to in the act of congress approved July 26th, 1866, entitled: An Act granting lands to the State of Kansas to aid in the construction of a southern branch of the Union Pacific Railway and Telegraph from Fort Riley, Kansas, to Fort Smith, Arkansas.

2. The acceptance of the terms, conditions and impositions of said act by the said Union Pacific Railway Company, Southern Branch, was signified in writing, under the corporate seal of said company, duly executed pursuant to the direction of its board of directors first had and obtained, which acceptance was made and deposited with the Secretary of the Interior within one year after the passage of said act.

3. The land in the petition described is a part of the lands known as the Osage Ceded Lands granted to the United States by the treaty between the United States of America and the Great and Little Osage Indians, proclaimed January 21st, 1867.

4. Prior to the 24th day of December, 1867 a line was surveyed for the route of said railroad, by G. M. Walker,

then Chief Engineer of said company, which was the line from which the lands mentioned in stipulation No. 7 herein, were withdrawn from market, but that line did not touch the southwest quarter of section thirty-four (34), township thirty-four (34), range twenty-one (21), which includes the land described in plaintiff's petition in this case, and afterwards and between May 1st, 1870, and June 6th, 1870, said company located its road on the line where now operated, and built same in substantial compliance with said act of congress, but the route of said road on its present location has never been approved by the president of the United States, unless such approval is shown by the other facts herein admitted.

5. The premises in plaintiff's petition demanded, lie wholly within one hundred feet of the center line of the main track of the railway so built and constructed as aforesaid, the center line or said main track being the center of the right of way of railroad company.

6. On the 1st day of December, 1880, the said Missouri, Kansas & Texas Railway Company leased said railway to said Missouri Pacific Railway Company, which has since possessed and operated the same as such lessee.

7. Upon the completion of said railway through said Osage Ceded Land, the President of the United States issued to the said Missouri, Kansas & Texas Railway Company patents under said act of congress, approved July 26th, 1866, for the alternate sections of land designated by odd numbers to the extent of five alternate sections per mile on each side of said railroad, which are the same patents set aside in the case of the Missouri, Kansas & Texas Railway Company, vs. The United States, reported in '92 U. S. Reports.

8. The quarter section, including the land in question, was entered and purchased by one W. A. Hodges from the government of the United States, on October 9th, 1869, and a certificate, in due form, was on that day, by the proper officers, issued to him therefor, and thereafter and on November 1st, 187), a patent in due form was issued therefor pursuant to the said entry, by the government of the United States to said patentee, Hodges, which was duly signed and executed, and a perfect chain of title from said Hodges, patentee, now runs to and terminates in said

defendant, J. B. Cook, and he is the owner thereof, unless the same is owned by plaintiffs by virtue of the facts herein admitted and the law governing the same. Defendant Printz is in possession of the premises in controversy as the tenant of defendant Cook.

9. None of the land in dispute lies within fifty feet of the line of the center of the main track of said railroad, nor does defendant claim any part of the strip of land within fifty feet on either side of the center of said track.

The plaintiff at the time of constructing said road, erected a depot building on its right of way, and the land on which said building stands is adjacent to the land in dispute, which said depot has been used all the time since its erection for the purpose of receiving freight and passengers for shipment, nor does defendant claim any ground on which side tracks of said railroads are now located.

(See pages 4, 5 and 6 of the record.)

The case was tried to the court in Labette County, Kansas, and judgment rendered for the defendant. It was taken on error to the Supreme Court of Kansas, and by that court the judgment of the lower court was affirmed. (See: Missouri, Kansas & Texas Railway Company, vs. J. B. Cook, 47 Kansas, 216.) The case is now here on error to the Supreme Court of the State of Kansas.

As appears from paragraph 1, of the agreed statement of facts the plaintiff, the Missouri, Kansas & Texas Railway Company, claims the land as a part of its right of way under and by virtue of the act of congress approved July 26, 1866, entitled:

"An act granting lands to the State of Kansas to aid in the construction of a southern branch of the Union Pacific Railway and telegraph, from Fort Riley, Kansas, to Fort Smith, Arkansas."

(See: 14 Statutes at Large, 289.)

I.

ASSIGNMENT OF ERRORS.

1. The supreme court of Kansas erred in holding that the plaintiff could not change its line of location from that designated as the route of the road in the map filed with the Secretary of the Interior.

2. The supreme court of Kansas erred in holding and deciding that the plaintiff could not re-locate and change its line of location over lands which were public or reserved lands at the time of the passage of the act of July 26th, 1866.

3. The supreme court of Kansas erred in holding and deciding that the plaintiff, by virtue of the Walker survey, without having the same marked upon the face of the ground, or its road built thereon had exhausted its power under the act of July 26th, 1866.

4. The supreme court of Kansas erred in holding and deciding that the act of July 26th, 1866, in any manner restricted the company as to its rights under the general law of Kansas to relocate and change its line of road at any time before the construction.

5. The supreme court of Kansas erred in holding and deciding that W. A. Hodges, who obtained patent title from the government of the United States to the southwest quarter of section 34, township 34, range 21, which includes the land in dispute, obtained a superior title to the land in dispute than the plaintiff had by virtue of the act of July 26th, 1866.

6. The supreme court of Kansas erred in not holding and deciding that the defendant, J. B. Cook, took the land with notice of the claims of the railway company by

virtue of its occupancy of its right of way across the same and subject to the burden thereby imposed.

7. The supreme court of Kansas erred in holding and deciding that the plaintiff did not have good title to the 200 feet of right of way across the southwest quarter of section 34, township 34, range 21, which includes the land in dispute.

8. The supreme court of Kansas erred in holding and deciding that the plaintiff did not have good title to the land in dispute in this action.

9. The supreme court of Kansas erred in holding and deciding that the defendant, J. B. Cook, could, by entry upon the land in dispute, defeat the plaintiff's claim of title and right of possession to the same.

10. The supreme court of Kansas erred in holding and deciding that the defendant, J. B. Cook, had any right, title or interest in and to the land in dispute or any portion thereof.

11. The supreme court of Kansas erred in holding and deciding that the defendant, J. B. Cook, had any right, title or interest in and to the land in dispute, or any portion thereof, by virtue of his deed from his immediate grantor.

12. The supreme court of Kansas erred in not holding and deciding that the claim of title and right of possession of the plaintiff was absolute and superior to the claim of title and right of possession of the defendant, J. B. Cook.

13. The supreme court of Kansas erred in holding and deciding that the line of road was definitely fixed by the filing of the map with the Secretary of the Interior designating the route thereon.

14. The supreme court of Kansas erred in holding and deciding that by the filing of the map with the Secretary of the Interior, designating the route of the road, that the

line thereof became definitely fixed and was not thereafter subject to change.

15. The supreme court of Kansas erred in holding and deciding that the map required by section 4 of the act of July 26th, 1866, to be filed with the Secretary of the Interior designating the route thereof, was a map of definite location of its line of road.

16. The supreme court of Kansas erred in holding and deciding that the map which the plaintiff was required to file in compliance with the provisions of section 4 of the act of July 26th, 1866, designating the route of the road, was controlling or in any manner affected the grant made of the right of way through reserved lands.

17. The supreme court of Kansas erred in holding and deciding that the Walker survey and the map thereof which was filed with the Secretary of the Interior, was binding upon the company as to the right of way given it by the act of July 26th, 1866, through reserved lands.

18. The supreme court of Kansas erred in holding and deciding that any map was required to be filed by the company designating its route through reserved lands.

19. The supreme court of Kansas erred in holding and deciding that the President of the United States had not approved of the location of the right of way of the constructed line through the Osage Ceded Lands.

20. The supreme court of Kansas erred in holding and deciding that any approval of the President was necessary at the time of the construction of the road through the Osage Ceded Reservation.

So much of the act of congress and the laws of the state as we deem applicable to this case are set out in our brief herein.

II.

ARGUMENT.

The Grant of a Right of Way was a Present and Absolute Grant, Conditioned only upon Use.

The rights of the company, so far as the right of way through reserved lands is concerned are derived entirely from section 1, of said act of July 26th, 1866, which section reads as follows, to-wit:

"*Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled;* That for the purpose of aiding the Union Pacific Railroad Company, Southern Branch, the same being a corporation organized under the laws of the state of Kansas, to construct and operate a railroad from Fort Riley, Kansas, or near said military reservation, thence down the valley of the Neosho river to the southern line of the state of Kansas, with a view to an extension of the same through a portion of the Indian Territory to Fort Smith, Arkansas, there is hereby granted to the state of Kansas, for the use and benefit of said railroad company every alternate section of land or parts thereof designated by odd numbers, to the extent of five alternate sections per mile on each side of said road and not exceeding in all ten sections per mile; but in case it shall appear that the United States have, when the line of said road is definitely located, sold any section, or any part thereof, granted as aforesaid or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, from the public lands of the United States nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States have sold,

reserved or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached as aforesaid, which lands, thus indicated by the direction of the Secretary of the Interior, shall be reserved and held for the state of Kansas for the use of said company by the said Secretary for the purpose of the construction and operation of said railroad, as provided by this act; *Provided*, That any and all lands heretofore reserved to the United States by any act of congress or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby reserved and excepted from the operation of this act, except as far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right of way, two hundred feet in width, is hereby granted, subject to the approval of the President of the United States; *And Provided, further*, That said lands is hereby granted shall not be selected beyond twenty miles from the line of said road."

By this section the company was given a right of way 200 feet wide through the reserved lands, subject to the approval of the President of the United States.

At the time of this grant the land in question was a portion of the Osage Indian Reservation. (See Paragraph 3 of the agreed statement of facts on page 5 of the record.)

L. L. & G. vs. United States, 92 U. S. 733.

Grintner vs. K. P. R'y Co., 23 Ks. 642.

Over all the land embraced within the limits of this Reservation congress had absolute power. In Missouri, Kansas & Texas Railway Company vs. Roberts, 152 U. S. 114, this Court used the following language:

"The United States had the right to authorize the construction of the road of the Missouri, Kansas & Texas Railway Company through the Reservation of the Osage Indians, and to grant absolutely the fee of the two hun-

dred feet as a right of way for the company Though the lands of the Indians were reserved by treaty for their occupation, the fee was always under the control of the government; and when transferred without reference to the possession of the same, and without designation of any use of them requiring the delivery of their possession the transfer was subject to their right of occupancy; and the manner, time and conditions on which that right should be extinguished were matters for the determination of the government and not for legal contestation in the courts between private parties This doctrine is applicable generally to the rights of Indians to lands occupied by them under similar conditions * * * * * And in grants by the government of portions thereof for works of internal improvement there usually was a stipulation for its extinguishment as rapidly as might be, consistent with public policy and the welfare of the Indians * * No such stipulation was made when the grant of the right of way through the Osage Reservation was made; but the uses to which the lands were to be applied necessarily involved their possession. That grant was absolute, in terms covering both the fee and the possession and left no right on the part of the Indians to be the subject of future consideration."

That the grant of the right of way was a *present* grant is clearly apparent from the language of the Act and has been so decided by this Court in the cases of:

The Leavenworth, Lawrence & Galveston Railroad Company, vs. The United States, 92 U. S., 733.

St. Jo. & Denver City Railway Company, vs. Baldwin, 103 U. S., 426.

Wilkinson, vs. Northern Pacific Railroad Company, 20 American & English Railway Cases, 320.

Railroad Company, vs. Alling, 99 U. S., 463.

By the Circuit Court in the case of Bybee vs. O. & C. Ry. Co., 26 Federal Reporter, 586.

Central Pacific Ry. Co., vs. Dyer, 1 Sawyer, 641.

There are no conditions whatever attached to the grant for right of way, but it is absolute and the right continues until used. Section 4 of the act of July 26th, 1866, reads as follows:

"*Be it enacted*, That as soon as said company shall file with the Secretary of the Interior maps of its line designating the route thereof, it shall be the duty of said Secretary to withdraw from the market the lands granted by this act, in such manner as may be best calculated to effect the purposes of this act and subserve the public interest."

But, it will be readily seen that this section requires the filing of the map for one purpose only, and that is for the purpose of determining the limits of the grant of lands which is made by section 1 of the act. The right of way is not conditioned upon the filing of the map thereof, and if the right of way is all that was granted no map would have been required.

Section 3, of the act, attaches certain conditions which affect the grant of lands; but nowhere are there any conditions so far as the right of way is concerned, except that the same was to be subject to the approval of the President of the United States. Under Section 3, if the road was not completed within ten years, there was a forfeiture of the land granted; but there was no forfeiture of the right of way provided for anywhere in the act.

A.

"A party locating upon any portion of this land within the probable line of the road did so subject to the right of way conferred by the act."

The distinction between the conditions pertaining to the

grant of lands and the grant of the right of way are clearly pointed out by this Court in the case of:

St. Jo. & Denver City Railroad Co., vs. Baldwin, 13 Otto, 426.

and we quote from the opinion as follows:

"But the grant of the right of way by the 6th section contains no reservation or exceptions. It is a present, absolute grant subject to no conditions except those necessarily implied, such as that the road shall be constructed and used for the purposes designated. Nor is there anything in the policy of the government with respect to the public lands which would call for any qualification of the terms. Those lands would not be the less valuable for settlement by the road running through them. On the contrary, their value would be greatly enhanced thereby.

The right of way for the whole distance for the proposed road was a very important part of the aid given. If the company could be compelled to purchase its way over any section in advance of its location very serious obstacles would be imposed to the progress of the road. For any loss of lands by settlement or reservation other lands are given; but for a loss of the right of way by this means, no compensation is provided, nor could any be given by the substitution of another route.

The uncertainty as to the ultimate location of the line of the road is recognized throughout the act, and where any qualification is intended in the operation of the grant of lands, from this circumstance it is designated. Had a similar qualification upon the absolute grant of the right of way been intended, it can hardly be doubted that it would have been expressed. The fact that none is expressed is conclusive that none exists.

We see no reason, therefore, for not giving to the words of present grant, with respect to the right of way, the same construction on which we should be compelled to give, according to our repeated decisions, to the grant of lands had no limitation been expressed. We are of the opinion, therefore, that all persons acquiring any portion of the

public lands, after the passage of the act in question, took the same subject to the right of way conferred by it for the proposed road."

We desire to quote from the opinion rendered by one of the learned Justices of this Court, while on the circuit, in the case of

Central Pacific R'y Co. vs. Dyer, 1 Sawyer, 641,

where this same distinction was made with regard to the conditions of the grant of lands and the grant of the right of way, and particularly with reference to the provisions of the statute requiring a map of the route to be filed.

The language of the court is as follows:

"The construction for which the defendants thus contend is clearly correct. The grant of the right of way is a present grant, operating immediately upon the passage of the act without reservation or exception, and is subject to no conditions except those which are subsequent or necessarily implied, such as, that the road shall be constructed within the period specified and be afterwards maintained and used for the purpose designated. All acquisitions of land over which this right of way was thus granted made subsequent to the passage of the act, were necessarily subject to the exercise of this right. The reservations and exceptions found in the third section apply only to the grants of land therein mentioned and do not apply to the grant of the right of way made in the second section.

The provisions of the seventh section, requiring the plaintiff within two years to designate the general route of the road, as near as might be and file a map of the same in the Department of the Interior, in no respect affects the grant of the right of way. It only furnished the means by which the Secretary could withdraw the lands within a specified distance of said designated route from pre-emptions, private entry and sale."

In Bybee, vs. O. & C. Railroad, 26 Federal Reporter, 586.

Judge Deady on page 589, says:

"Nor did the failure to complete the road by July 1st, 1880, in any view of the matter, cause the act of 1866 to become "null" as to the right of way. The grant of the right of way is a separate and distinct matter from that of the lands to aid in the construction of the road. The reservation or forfeiture provided for in section 8 of the act of 1866, does not include the right of way but is limited to the lands remaining unpatented or unearned at the time of the failure. The grant of the right of way is without condition except that which the law tacitly annexes to all such easements * * * the liability to be lost or forfeited for non-user, ascertained and determined in a judicial proceeding instituted by the government for that purpose * * * but it is also a present absolute grant and takes effect when the line of road is located from the date of the act, as against any intervening claim or settlement whatever. Whoever settled on or appropriated for any purpose, under any law of the United States, any portion of the public lands on the possible line of this road after July 25th, 1866, did so subject to the grant of this right of way to this defendant."

In this last case, the act under consideration by the court provided that unless the road was completed by July 1st, 1880, the act should be "null and void," and all lands not conveyed by such company at that date should revert to the United States. But it was held that this provision of the act only applied to the grant of lands and not to the grant of the right of way. The act of July 26th, 1866, under which the plaintiff in error in the case at bar claims its right of way has no words of limitation whatever. The only reference to the filing of a map in the office of the Secretary of the Interior is in section 4 of the act herein above quoted, and the language is:

"That as soon as said company shall file with the Secretary of the Interior maps of its line designating the route thereof, &c."

There is no requirement anywhere in the act that there shall be a map of definite location or any map of the 'loca-

tion, but simply a map that designates the route, that is, the direction. There is nothing in the act that prohibits or forbids the company from definitely locating its line after the filing of this map. There is nothing in the act that forbids or prohibits the company from locating and building its line upon a location entirely different from that designated as the route of said road. We take it that there is a vast difference in the meaning of the language used in section 4 of the act of 1866 and that of other acts referred to wherein the company is required to file a map of the definite location of its road. This act requires the designation of the route thereof, but does not require a map of the definite location of the line of the road.

It does not appear from the agreed statement of facts the exact date the map provided for by section 4 of the act of July 26th, 1866, was filed by the company, but paragraph 4 of the agreed statement of facts, shows that a line was surveyed by G. M. Walker, then Chief Engineer of said Company, and was the line over which the lands mentioned in stipulation No. 7 of the agreed statement of facts were withdrawn from market, but that survey did not touch the south-west quarter of section 34, township 34, range 21, which includes the land described in the plaintiff's petition in this case.

From all that appears in the entire act of July 26th, 1866, the company could have filed the maps defining the route of the road without any survey whatever, provided these maps indicated a line sufficiently definite to enable the Secretary of the Interior to determine the limits of the land grant and withdraw the land within such limits from homestead and pre-emption settlement.

The act of July 26th, 1866, under which the plaintiff in error claims its right of way in this case, differs from almost any other act passed by congress granting lands

in aid of railroads, in this, that it does not require a *survey* or *definite location* of the line of the road. "Maps designating the route thereof," does not mean an actual survey or accurate location of the line. The defendant contends that the statutory requirement of the act of July 26th, 1866, was that, when the map was filed the line was thereby definitely located. But a careful analysis of the act clearly shows that such was not the intention of Congress. If Congress had meant to require the line to be definitely fixed before the lands were withdrawn from market it would have used apt words in the act to have expressed its intention, and the absence of such words clearly indicates that it was not the intention of congress in passing the law to require the line to be definitely fixed before the lands were withdrawn from market.

From paragraph 8 of the agreed statement of facts, (See: page 5 of the record), it appears that W. A. Hodges, the remote grantor of J. B. Cook, defendant in this action, obtained this land from the government on October 9th, 1869, which was some three years subsequent to the passage of the act under which the plaintiff herein claims its right to this land. And though Hodges obtained the land from the government subsequent to the Walker survey, yet it nowhere appears in the agreed statement of facts that he had any knowledge of the Walker survey, or that he was induced to take this land by reason of the fact that the Walker survey did not touch it; that he had no reason to believe from any act of the company that it would not eventually locate its line of road through this land. Nor does it appear from the agreed statement of facts, that any of the grantors of the defendant in this case claimed this land; but it appears it was admitted that the railroad company had a right of way 200 feet wide through the quarter section which the defendant now claims. So that Hodges, having taken the land subsequent to the date of the act took it subject to the right of way which was given

the plaintiff by the act and which it might eventually locate over the same.

B.

The Walker survey and the filing of the map thereof with the Secretary of the Interior designating the route of the company did not exhaust its power or right under the act.

It will be contended that upon the filing of the map of the Walker survey, that this was an absolute appropriation of the land, through which the Walker survey ran, for a right of way and that by the filing of the map the line became definitely fixed and was not thereafter subject to change.

Paragraph 1, of the agreed statement of facts, shows that the Missouri, Kansas & Texas Railway Company, was on the 25th day of September, 1865, duly organized as a corporation under the laws of the State of Kansas, as the Union Pacific Railway Company, Southern Branch. That on the 3rd day of February, 1870, its name was duly changed and made the Missouri, Kansas & Texas Railway Company. Being a railway corporation of the state of Kansas, it had certain powers given it under the laws of the state. We desire to call the Court's attention to section 1210 of the General Statutes of Kansas, of 1889, which reads as follows:

"The directors of any railway corporation may, by a vote of two-thirds of their number, at any time change the road bed or road line or any part thereof, for the purpose of shortening the line or to overcome any obstacles; but such corporation shall not change the general route or terminus of the road."

Under the laws of the state, therefore, even though the road bed had been graded, yet by the vote of the directors the same might be changed for the purpose of overcoming any obstacle; but the general route of the road could not be changed.

When the right of way was given by congress under section 1 of the act of July 26th, 1866, it was not intended by the act to restrict the power of the corporation under the state law with reference to the selection of its right of way; and the only effect of the grant of the right of way was to give the same to the company without compensation or trouble. The government desired the building of the road between two important frontier posts: Fort Riley, Kansas, and Fort Smith, Arkansas, and the grant of the right of way was one of the inducements offered for the building of the road. There is nothing in the act to indicate that congress intended to restrict the power of the corporation, as it existed under the laws of Kansas granting the company its charter, and the section of the state statute hereinabove quoted, gave it the right to change the location of its line for the purpose of shortening the same and overcoming all obstacles, and was enacted prior to the granting of the charter and is one of the charter powers of the company.

We have attempted to show herein that the map required by the act to be filed, was for the sole and only purpose of enabling the Secretary of the Interior to designate and determine the limits of the land grant, and had nothing whatever to do with the determining the definite location of the right of way. If the company should have surrendered its right to the land grant, then no map would have been required to be filed in the Department of the Interior, and it would have secured under the grant, its right of way over public and reserved lands notwithstanding. If the only purpose Congress had in view by requir-

ing the map to be filed in the office of the Secretary of the Interior, was to enable the Secretary to determine the limits of the land grant, then the only effect of the deviation in the construction of the line from that designated in the map, would be to interfere with or change the limits of the land grant; and yet, we see that a deviation from the line designated in the map filed with the Secretary of the Interior, has been repeatedly held not to interfere in any way with the limits of the land grant. We call the Court's attention to the case of:

Van Wyck, vs. Knevals, 106 U. S., 360,

in which it was held that a deviation did not affect the grant of lands.

The court said:

"As to the alleged deviation of the road constructed from the route laid down in the map; admitting such to be the fact; the defendant is in no position to complain of it; the lands in controversy are within the required limit whether that be measured from one line or the other. The deviation of the r ad without consent of congress so as to take the road beyond the lands granted, might raise the question, whether the grant was not abandoned; but no such question is here presented."

In the case of:

The Central Pacific Railway Co. vs. Dyer, supra.

the question was squarely before the court, in which it was practically held that the company was not bound to construct its road upon the line designated in the map, but might deviate therefrom within the limits of the land grant.

In the case of:

A. T. & S. F. Ry. Co. vs. Mecklim, 23 Kansas, 167,

the supreme court of Kansas held that a railroad company was not bound to build its line even upon the line of definite location. We quote the language of the court from the opinion thereof, commencing on page 172:

"But if we take the maps as our guide in regard to the changes of the routes of the road through ranges 14 and 15, we cannot say that such changes as appear therefrom are anything more than such as might be required in the actual construction of the road to correct curves. If the argument of counsel for defendant is followed out to its logical results, we must virtually decide that there could be no definite location of the railroad in question, except by the actual construction of its road bed, because it is rarely possible or customary to construct a railroad on the identical survey of its line without making a single change or deviation for any purpose, and such a construction would be unreasonable and also opposed to the meaning given to the terms "of definitely fixing the line or route of a railroad" by the Department of the Interior."

In that case the line of definite location did not strike ranges 14 and 15 in Barton County, Kansas, and yet the road was constructed through the ranges showing that there was a deviation of several miles. In the agreed statement of facts in the case at bar it is not shown how much of a deviation there was from the map of the Walker survey designating the route of the road. It may have been a few hundred yards or it may have been several miles.

The right of the company to deviate from the Walker survey was guaranteed by the general law of the state of Kansas providing for the organization and incorporation of such companies, and there was nothing in the act of congress of July 26th, 1866, which in any manner restrict-

ed this power. Not only was this right guaranteed to the company by the general law of Kansas, but in this country where corporations are organized under general laws, this power or right is conceded, and the doctrine is laid down by Mr. Rorer in his work on railroads, in volume I, page 274, section 2, in the following language:

"Railroad corporations may relocate and change the routes of their roads at discretion in this country, from time to time, as often as they may regard the same as necessary, unless they are organized under special charters granted by act of assembly, expressly or inferentially restricting them in that respect, or designating or confining them to particular localities and routes, in which case they cannot. The powers of such corporations, when the companies are formed by voluntary association and articles of incorporation under and by virtue of a general incorporation law, are not exhausted by one or more locations of a particular line or lines They may change the same, or they may locate, build and operate new lines, within the scope of their charters, at pleasure."

In England the charter of a railway corporation is granted by a special act of parliament, and the charter designates the particular land over which the road is to be constructed for the entire route, and of course, under such a charter there can be no deviation from the exact line designated therein. But in this country railway corporations are organized under general corporation laws, and they are not required to do more than designate in their charter a few points in the proposed line of construction, and hence are not bound to any particular line established by the preliminary survey or by any survey made prior to the actual construction of the road:

Minehill & S. H. R. R. Co. vs. Lippincott, 86 Pa. St., 468.

Gear vs. D. & S C. R. R. Co. 20 Iowa, 523.

Mahaskey County R. R. Co. vs. D. M. & V. R. R. Co., 28 Iowa, 437.

In the case of Gear vs D. S. & C. R. R. Co., supra, the supreme court passing upon this question uses the following language.

"Our statutes as to the incorporation of railroad companies and the condemnation of land for right of way proceed upon an entirely different principal from the English statutes. There, the railroad company in its application to parliment for its charter, must designate the particular land over which the road is to run; the company being chartered notifies the owner that it requires his land for its road, and offers him a price; he accepts or declines, with a counter offer; if there is no agreement a jury is impaneled and they decide between the propositions or assess the amount; the verdict is registered as a conveyance from the owner to the corporation. The company is bound by their charter to procure the particular land, and there is, of course, no receding from, or opportunity for refusal to take the title upon the terms of the verdict or assessment, if there is no prior agreement as to terms between the parties. The company is bound from the time of the notice to take the land at the price fixed by the verdict * *

But in this country railroad companies are chartered either by special or general law, and are only required to state the termini of their proposed roads. They are thus left free to select the cheapest as well as the most practicable route between such termini, sometimes hundred of miles apart, and are controlled only by the wish or interest of the company. Ex Parte The South Carolina Railroad Company, 2 Rich., 434; North Missouri Railroad Company vs. Lackland, 25 Mo., 515. The selection of the precise route may depend upon the present or supposed future commercial or agricultural condition and capacity of the localities traversed, or it may possibly be made to depend upon the cheapness of the right of way or character of the grades. But let it depend upon whatever it may, the right of the company to fix the route primarily, and to change it in advance of (and perhaps after) actual construction, in accordance with their own discretion, is a right which cannot now be questioned."

In the 28 Iowa, supra, the supreme court of that state again had this question before it, and affirmed and ap-

proved of the decision in the 20 Iowa, from which we have just quoted above, and the language of the court in the later case is as follows:

"Its power is, by no means, exhausted by the location of one line. The organization was under a general law, not a special charter. It was not held, as under a charter from parliament, in England, to build its road over particular lands. The route may be fixed, then changed, and changed as often as it may be deemed necessary (before construction, certainly), the company of course being liable to costs in connection with further assessments and such incidental liabilities as may arise from inconvenience or trouble, or otherwise, to landholders Gear vs. Dub. & S. C. R. R Co., 20 Iowa. 526."

Now, in this case, the agreed statement of facts is all the light we have, and it does not appear that the line was marked upon the face of the ground, nor does it appear that a single stake had been driven anywhere or that work was ever actually commenced upon the line of the Walker survey; all that appears from the agreed statement of facts is that Walker did survey a line through these lands and that the company designated that as the route of the road; but that there was ever a yard of grading, or work of construction of any kind performed upon the line, or that the line was in any way marked upon the face of the ground. the agreed statement of facts is wholly silent, and therefore, it is to be presumed that nothing of the kind was ever done. As to what constituted an appropriation of the land for the right of way was decided by this Court in the case of:

D. & R. G. R. R. Co. vs. Alling, supra,

and so much of the decision as is pertinent to this question we set out herein at length:

"It is here suggested by counsel for the Denver company that the surveys made in the Grand Canon in 1871

and 1872 constituted without further action on its part a sufficient location and appropriation of at least that part of the designated route. To this proposition we can not yield our assent. The right of way through that pass was not in itself and separate from the right of way along the whole route, of any special value except the company surveyed its line and located its road east and west of the defile. The grant was an entirety as to the right of way over all the lands lying on the route designated in the charter of the company, and it would be unreasonable to say that as to a particular part of that route a mere preliminary survey was in itself equivalent to a fixed location of the road and an appropriation of the way granted, while as to another part of the general route a similar survey would not be an appropriation of the way granted unless followed by the actual occupation and use for railroad purposes. Any such contruction of the statute must be held altogether inadmissible."

In the case from which we have just quoted, an examination of the record discloses the fact that the engineer of the D. & R. G. Ry. Co. testified that in January and February of 1871, the Denver Company caused a survey to be made through the grand canon of the Arkansas river. That the survey extended through the entire length of the canon. A line very near location, without actual lolation of the curves, but the curves could have been made in his office away from the canon, with that exception he pronounced it to be a complete survey. It was marked by stakes every 100 feet numbered consecutively, and where it was necessary a plus, or stake, between every 100 feet was added. A map and profile was made and returned to the chief engineer of the company, after the survey, and employes of the company under direction of its engineer removed several hundred yards of material, graded several hundred feet at the outlet of the canon and put in a retaining wall 10 to 15 feet high and about 100 yards in length, and this the Denver Company claimed was a location of its line and an exercise of the right given them by congress to occupy this very ground, for the purpose of con-

structing a line of railroad to be constructed through the grand canon, and yet this Court, as is apparent from that portion of the opinion which we have quoted hereinabove, decided that that was not an actual appropriation of the ground for right of way, and nothing short of an actual occupation and use for railroad purposes constituted an appropriation under the grant of the act of congress.

Tested by this rule, there never was any actual, definite location of the line or any pretense of an appropriation of the ground over which the Walker survey was made, to railroad purposes.

The question naturally now suggests itself. What is the evidence of the definite location of the road? The survey and map are not by the act of congress made evidence of it, nor is there any rule of law with which we are familiar that makes the survey and map evidence of the definite location of the road. Then, in the absence of any arbitrary rule, either provided for in the act of congress or by some general law, the best evidence, if not the only evidence, is the building of the road upon the line where it has been operated for the past twenty years. The fact that the road was not built upon the line of the Walker survey raises the natural presumption that it was not intended by the company to be the definite and final location of the line of the road.

It is held in the following line of authorities that the complete construction of the road does not exhaust the corporate power of the company, and it can still abandon its line and adopt a new one, if necessary:

Fisher vs Chicago & S. R. R. Co. 104 Ills., 323.

C. B. & Q. Ry. Co. vs. Wilson, 17 Ills., 123.

Peck, vs. L. N. A. & C. Co. 101 Ind., 366.

Prather, vs. J. M. & I. R. R. Co. 52 Ind., 16.

C. B U. P. Ry. Co. vs. A. T. & S. F. Ry. Co. 26 Kas., 669.

Hamilton, vs. A. & E. Ry. Co. 1 Md., 553.

M. & T. Ry. Co. vs. Devany, 42 Miss., 555.

A. & P. R. R. Co., vs. St. Louis, 66 Mo., 228.

Deitrich, vs L. & N. R. R. Co., 13 Neb., 361.

V. & T. R. R Co., vs. Lovejoy, 8 Nev., 100.

Beck, vs. U. N. J. R. R. Co. 39 N. J. L., 45.

Seldon, vs. D. & H. C. R. R. Co., 29 N. Y., 634.

In re N. Y. Central &c. R. R. Co., 67 Barb. 426.

Johnson, vs. Utica W. W. Co. 67 Barber, N. Y., 415.

Toledo & W. R. R Co. vs Daniels, 16 O St., 390.

Farnham, vs. D. & H. C. R. R. Co., 61 Pa. St., 265.

P. W. & B. R. R. Co., vs. Williams, 54 Pa. St., 103.

S. C. R. R. Co. vs. Blake, 9 Rich. (S. C.), 228.

Ex parte S. C. R. R. Co., 2 Rich. (S. C.), 434

The question is here suggested that if the complete construction and operation of a railroad does not exhaust the company's corporate powers so as to preclude it from taking further property for its use in case of necessity, how can it be said that the mere survey of a line and filing of a map with the Secretary of the Interior alone, and without any further appropriation of the ground, is such an act of the corporation as exhausts its power or right in that respect, and that it cannot abandon that line and locate and construct upon another under the same grant.

Why should the rule be changed when there is nothing in the act of July 26th, 1866, restricting the power of the corporation in any manner whatever; when there is nothing to show in the testimony that Hodges, the remote

grantor of the defendant, Cook, in this case, had any knowledge or information of the Walker survey, or of the particular land over which it ran, or that such a survey had ever been made; in the absence of all evidence that there were any marks upon the face of the ground, any stakes driven, any grading done, or work of any kind performed, or that the railroad company ever had any intention of building its road upon the line of the Walker survey at any time or that such survey was sufficiently accurate to be called a definite location of the line for the purpose of construction?

III.

There was no necessity for the approval by the President of the right of way through the Osage Ceded Lands at the time of the construction of the road.

The provision making the grant of the right of way through reserved lands subject to the approval of the President, was inserted in the act for the purpose of preventing a location which would defeat the object for which the reservation might be held and of securing such a location as would work the least injury to the reservation. When the reservation was set aside and the Indian title thereto extinguished the reason for the approval of the President ceased and none was necessary. If it was necessary it was given when the President issued the patents to the company for these Osage lands earned by the construction of the road through the Osage Ceded Lands. Under the act of congress the patents were not to be issued until the road was actually constructed. The issuance of the patents was a declaration by the President that the road had been constructed through the Osage Ceded Lands in ac-

cordance with the act of congress, and so far as any approval of the location of the same, by the President, was necessary, this declaration is conclusive. It is immaterial that this approval was made after the entry of defendant's grantor. When the road was constructed and the President approved of the location, by act or word, then the grant took effect as of the date of the act of congress:

R. R. Bridge Co. vs. K. P. Ry. Co. 12 Kas., 409.

and affirmed in the

92 U. S., 315.

The race by the different railroads for the right of way through the Indian Territory was a matter of public notoriety and the court will take judicial knowledge of the result thereof as a part of the general history of the state. This was decided by the supreme court of Kansas, in:

Spear, vs. M., K. & T. Ry. Co. 23 Kansas, 571.

Under section 3 of the act of July 26th, 1866, hereinabove quoted, the Governor of the state of Kansas was required to certify to the Secretary of the Interior, that each section of 10 miles of the road as the same was completed, was constructed in a good, substantial and workmanlike manner, etc. This certificate required the Governor to certify as to the exact location of the constructed road and was accompanied by a map showing the land over which the road was constructed and it must necessarily have been brought to the attention of the Department of the Interior, as well as to the attention of the President that the construction of the line of road deviated from the line of the Walker survey. That being the fact, and the patents having been issued for the land earned by the construction of each 10 miles of the road, as the same was con-

structed, it is presumed that such patents would not have been issued if the President had not approved of the location of the road as shown by the certificate of the Governor of Kansas

On the 12th of July, 1870, the Secretary of the Interior reported to the President that the plaintiff's road had been constructed in accordance with the provisions of the act of July 26th, 1866, from Fort Riley, Kansas, down the Neosho Valley to the Northern boundary of the Indian Territory, south of Chetopa. This report showed a construction through the Osage Ceded Lands and on July 20th, 1870, the President approved this report and awarded the Missouri, Kansas & Texas Railway Company the right of way through the Indian Territory. If any approval of the President was necessary as to the location of the road this is another evidence of the approval of the location through the Osage Ceded Lands. The Osage treaty, (See 14 Statutes at Large, page 687), contained a provision that the lands ceded should be sold as public lands are sold under existing laws, "including any act granting lands to the State of Kansas, in aid of the construction of a railroad through such lands." The grant to the Missouri, Kansas & Texas Railway Company, was made July 26th, 1866. The above provision was agreed to by the Osage Indians September 29th, 1866, and the treaty was ratified and proclaimed by the President, January 21st, 1867. This was another approval by the President, if any approval was necessary. But the fact that the President, after the road had been constructed through the reservation, awarded to the Missouri, Kansas & Texas Railway Company the right of way through the Indian Territory, and that too after every objection possible has been urged by rival companies building competing lines, it seems to us, is absolutely conclusive that the location upon the line where constructed was approved by the President, if any such approval was necessary at the time of the construction of

the road. But it seems to us absolutely clear that the land being no longer an Indian reservation, the title of the Indians and their right of occupancy having been extinguished prior to the location and construction of the road, the approval of the President was no longer necessary.

IV.

The defendant, J. B. Cook, having purchased this land subsequent to the construction of the railroad through the same takes it subject to the claim of the railroad company for a right of way through it.

From paragraph 4, of the agreed statement of facts, found on page 5 of the record in this case, it appears that the railroad was constructed across this land between May 1st, and June 6th, 1870. It appears from paragraph 8 of the agreed statement of facts, on page 5 of the printed record in this case, that Hodges obtained the land from the government October 9th, 1869, and a patent was issued to him November 1st 1870. It appears that Hodges was claiming to own the land by virtue of his certificate of purchase from the government at the time of the construction of the road over the same. The record is wholly silent as to whether or not he was in possession of the land. But he must certainly have consented to the construction of the road over the same, and therefore, it is fair to presume that he recognized the railroad company's claim of a right of way 200 feet wide through the same by virtue of the act of congress of July 26th, 1866; because it nowhere appears that the railroad was located and constructed across this land by virtue of any agreement which it had with Hodges or any grantor of his, and consequently, the location and construction must have been

on the part of the company, at least, under and by virtue of the act of July 26, 1866, and Hodges must have recognized that claim and consented to the construction of the road. It nowhere appears that Hodges at any time disputed the railroad company's title to this right of way or to any portion of it. It nowhere appears that any grantor of Cook, defendant herein, and under whom he claims, ever at any time disputed the company's title or right of possession to the right of way over this land or any portion of it. Cook, by virtue of his deed to the entire quarter took no greater rights than his grantors had: and if his grantors, by virtue of their conduct, were estopped from asserting possession or title to this land, then he was estopped. The simple deed of conveyance to him by his immediate grantor gave him no greater rights than what the grantor had. Cook could not assert title by simply taking possession of the land and compelling the railroad company to bring an action of ejectment against him. For nearly 20 years this railroad company had been in the possession of this land. For nearly 20 years it had been operating trains over this land with the consent of the defendant or his grantors. A depot stands adjacent to the same on its right of way. If Cook or his grantors could not bring an action of ejectment against the railroad company, they could not assert a right by entry which they could not assert by action of ejectment or forcible entry and detainer. His entry thereon is a mere naked trespass, and if by the conduct of himself and his grantors he was estopped from asserting any right to this land by action of ejectment, such right could not be asserted by a mere entry.

Where a party stands by and permits a railroad company to enter upon his premises and construct a line of road across the same, he will be presumed to have consented to such entry and he cannot thereafter eject the railroad company or disturb its operation by a mere entry

upon the same premises, and he will be confined to his action for damages. This is the general doctrine and it is nowhere more clearly announced than in the case of:

Goodin, vs. Cincinnati & Whitewater Canal Co. 18 Ohio St., 169.

We quote the opinion as follows:

"Where a party stands by, as we presume the plaintiffs to have done in the present case, and silently sees a public railroad constructed upon his land, it is too late for him, after the road is completed, or large sums have been expended on the faith of his apparent acquiesence to seek by injunction, or otherwise, to deny to the railroad company the right to use the property. Considerations of public policy, as well as recognized principles of justice between parties, require that we should hold in such cases that the *property* of the owner cannot be reclaimed, and that there only remains to him a right of *compensation*. The injunction in the present case might have been sought at the first known attempt, or even threat, to despoil the canal or to construct a railroad upon its line. The omission to do so is an implied assent. The work being completed, the public, as well as those directly interested in the road, as stockholders and creditors, have a right to insist on the application of the rule, that he who will not speak when he *should*, will not be allowed to speak when he *would*. So far, therefore, as regards relief by way of injunction, or the right of the Cincinnati & Indiana Railroad Company to the continued use of the property, we deem it quite immaterial whether the proceedings of condemnation and appropriation are void or valid; or if void, whether they are so for want of power in the railroad company to *condemn*, for want of power in the canal company to *agree* upon the price, or for want of an assessment by a *jury*. It is enough to know that the appropriation has in fact been made, and that the plaintiffs have delayed their suit so long and under such circumstances, that to grant the request now would work a great public injury, and be a virtual fraud upon the Cincinnati & Indiana Railroad Company."

There are numerous other authorities sustaining this same doctrine, from which we have selected the following:

Atlantic & Gulf R. R. Co. vs. Fuller, 48 Ga., 423.

Mills on Eminent Domain, sections 140-1-3.

Traphagen, vs. Jersey City, 29 N. J. E., 206.

Sabin, vs. Vermont Central R. R. Co. 25 Vt., 363.

Wood's Railway Law, Vol. II, page 786-792.

Mo. Pac. Ry. Co. vs. Gano, 47 Kansas, 457.

Harlow, vs. M. H. & O. Ry. Co., 41 Mich. 336.

Cooley's Constitutional Limitations, 562.

Baker, vs. C. R. I. & P. Ry. Co., 57 Mo., 265.

Pittibone, vs. L. C. M. R. R. Co., 14 Wis., 479.

Buchanan, vs. L. C. & S. W R. R., 71 Indiana, 265.

Pickart, vs. Ridgefield & C. R. R., 25 N. J. E., 316.

Attorney General, vs. N. Y. & Branch R. R., 24 N. J. E., 49.

It does not appear that any grantor of the defendant, Cook, was ever in possession of the land in dispute in this action. It is true that when Hodges entered the land he had color of title, and assuming it to be a fact that he was a settler upon the same, he had possession thereof; but the moment that the railroad company entered, his title thereto was defeated as to so much as was claimed by the plaintiff for its right of way over the land. Then, Hodges' possession amounts to nothing unless his possession is upon the lap or conflict which is now in dispute. There is not a word of testimony, or scintilla of evidence anywhere showing that Hodges, or any grantor of the defendant, Cook, ever was on the land in dispute in this case, or that the railroad company's title was in any manner disputed until the entry upon the same by the defendant, Cook. So,

for nearly 20 years the railroad company's title and right of possession to the identical land in dispute was unquestioned, and if adverse possession is relied upon by the defendant as a defense in this case, the agreed statement of facts must show it, and it must not be left to inference or conjecture. It is a fact which must be proved, and the burden is upon the defendant who interposes and relies upon it as a defense.

2 Greenleaf on Evidence, Sec. 430.

Weaver, vs. Wilson, 48 Ills., 125.

Jackson, vs. Burner, 48 Ills., 203.

Tiedemen on Real Property, Sees. 693 and 704.

Wood on Limitations, chapter 20.

Sedgwick and Waite on Trial of Title to Land, Ch. 28,

2 Smith's Leading Cases, 9 American Ed. pages 1986–90.

Rung, vs. Shonberger, 2 Watts, 23.

Same case, 26 Am. Dec., 95.

Buswell on adverse possession Sect. 236.

Possession under an inferior grant conflicting in part with a superior grant but not on the lap or conflict, will not bar the right of the owner of the superior grant by limitation; but possession under an inferior grant, to put the statute of limitations in motion must be on the conflict or lap, although the owner of the superior grant be not in possession of any part of his grant. The law which carries the possession to the title carries it to the real title:

Carson, vs. Burnett, 1 Dev. and B., 546.

Same case, 30 Am. Dec., 143, and note on page 154.

White, vs. Burnley, 20 Howard, 235.

Bailey, vs. Carlton, 12 New Hampshire, 9.

Same case, 37 Am. Dec., 190.

If the true owner has possession of part of the land he has constructive possession of all the land not in the actual possession of the intruder. The reason is plain; both parties can not be seized of the same land at the same time under different titles. The law, therefore, adjudges the seisin of all that is not in the actual possession of the adverse party to be in him who has the better title:

Hunnicut, vs. Payton, 102 U. S., 368.

Where the legal owner takes actual possession of any part of the premises the constructive possession of the former adverse claimant is destroyed and he will therefore be confined to his *pedis possessio*.

Sedgwick and Waite, Sec. 474, page 649.

Altemus, vs. Long, 4 Pa. St., 254.

Same case, 45 Am. Dec., 688.

It appears from the agreed statement of facts that the land in dispute does not lie within 50 feet of the line of the Missouri, Kansas & Texas Railway as constructed across the quarter section of land of which the land in dispute forms a part but does lie within 100 feet of such line. It is clearly shown that the defendant has recognized that the railroad company was entitled to the right of way across the land, and that his only dispute with the company is as to the amount thereof. If the company does not own the land in actual contention in this case, it does not own the land under its track and depot. Its only title is by virtue of the act of July 26th, 1866, giving it a right of way 200 feet wide. Conceding that it is entitled to 100

feet of the right of way, is a concession that congress had the power to grant a right of way, but denies its power to grant more than 100 feet for the right of way. This concession, if held to be one, is fatal to the claim of the defendant were he otherwise entitled to the land in controversy.

We respectfully ask and pray that the decision and judgment of the supreme court of Kansas in this case should be reversed and that said court be instructed to render judgment for the plaintiff.

All of which is respectfully submitted,

JAMES HAGERMAN AND
T. N. SEDGWICK,
Attorneys for Plaintiff in Error.

Office Supreme Court U. S.
FILED.
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Objection to Hearing.

Plaintiff filed no assignments of error at the time of suing out the writ, nor at any other time until they appeared in his brief. Section 997 of the Revised Statutes makes the assignment of errors a necessary part of the record. While section 2 of rule 21 of this court requires counsel to also print the assignments of error, on which they rely, in their brief, I do not understand that to be a compliance with section 997. I submit that under section 4 of rule 21 it is only at the request of court that counsel for plaintiff can be heard.

The Facts.

1. This is an action of ejectment.

2. Plaintiff bases its claim on the proviso in section 1 of ch. 270, 14 U. S. St. at L. 289.

3. Plaintiff made two lines of survey for its road—the first prior to December 26, 1867, which went something like a mile west of the one subsequently run, far enough away, as shown by the record, that it did not touch the quarter section containing the land in controversy; the second line was run subsequent to May 1, 1870. A map and profile of the first line was by plaintiff filed in the office of the Secretary of the Interior, in compliance with the provisions of section 4 of said act of congress, and from that, plaintiff's supposed land grant was withdrawn from market. Plaintiff's line of road was built on the second survey between May 1, 1870 and June 6, 1870.

4. After the location of plaintiff's first line and the filing of the map thereof in the office of the Secretary of the Interior and before the survey or location of the second line, and on October 9, 1869, the quarter section containing the land in controversy was entered at the government land office by W. A. Hodges, under the joint resolution of congress approved April 10, 1869.

5. Between May 1, 1870 and June 6, 1870, plaintiff constructed its line of road through said quarter section of land and occupied for same a right of way one hundred feet in width.

6. The land in controversy adjoins plaintiff's right of way as claimed by it from the construction of its road up to the commencement of this suit.

7. Defendant and his grantors have been in the quiet and uninterrupted possession of the land in controversy,

claiming title thereto under the said entry by Hodges, since October 9, 1869.

8. Plaintiff commenced this action on August 17, 1887.

Points for Argument.

I submit and shall attempt to establish the following propositions :

I.

This case should not be decided against defendant because plaintiff asserts and supports by authority several propositions which we do not controvert.

II.

Defendant did not purchase the land in controversy with any knowledge of or subject to the claim now set up by plaintiff.

III.

A grant for a right of way depending for its validity upon the approval of the President of the location of the line of road cannot be maintained without a clear showing of such approval.

IV.

The survey of a line of road and filing map and profile thereof with the Secretary of the Interior is a definite location of such route.

V.

A corporation authorized to locate a right of way and construct a railroad, having exercised the right once has exhausted its power, and cannot, without special power conferred on it for such purpose, thereafter lawfully select a second route.

VI.

The action of the land department in issuing to

defendant a patent to the quarter section, including the land in controversy, is an adjudication, conclusive in its nature, in favor of defendant's claim and against that of plaintiff.

VII.

Congress having granted a right of way through public lands for a line of railroad, and the company to whom such right of way is granted having located the same, any one may thereafter purchase any portion of such public land without liability of having the same taken from him under such grant of right of way by a subsequent relocation of the line.

VIII.

By Kansas practice any defense may be made to an action of ejectment under the answer filed in this case: therefore plaintiff must make it appear that the statute of limitations has not run against its claim.

The Argument.

I.

Plaintiff has an ingenious way of avoiding or getting over the difficulties in this case by arguing points which are not controverted. That the grant of the right of way by the act of July 26, 1866 was a grant *in presenti*, that until the line was located the grant was a float and any one purchasing within the possible line of the road did so subject to the right of way, that the company was not bound to file a map of its line with the Secretary of the Interior unless it chose to do so, may all be conceded without in the least weakening defendant's position. That a purchase *before* the location of the line of the road, as in

the case of St. J. & D. C. R. R. Co. vs. Baldwin, 103 U. S. (13 Otto) 426 (bk 26 p 578), is made subject to the right of way may be admitted without conceding that a purchase made *after* such location, as in the case at bar, is subject to such right. Defendant does not insist that plaintiff was bound to file a map of its location, but he does insist that having done so, as it had a right to do, it shall be held to all the results belonging to and flowing from such act, one of which was the definite location of its line of road. Before claiming a right of way plaintiff must have located its road in some way—by filing a map of its location, by actually constructing its road, or in some other manner ; it chose to do this in the usual way of a survey and filing map thereof with the Secretary of the Interior. It now seeks to relieve itself from the inevitable result of such act by arguing that its only purpose in filing the map was to locate its land grant. The question is not what object plaintiff had in view in filing a map of its located line, for plaintiff was not the only one interested Every one contemplating settling on those lands was as much interested as plaintiff in knowing where the road was to run, and we must believe that the intention of congress, in providing for the filing of a map in an office accessible to all, was to give knowledge to all who were interested in the fact of location. When, therefore, the map was filed it carried with it all the obligations as well as the rights legally attaching to such act.

I think these preliminary remarks are all that need be said in answer to the points assumed and argued by counsel for plaintiff on pages 8—16 of their brief. Some matters therein referred to will naturally be discussed under subsequent heads of this brief.

II.

In answer to plaintiff's claim, as set out in the IVth subdivision of counsel's brief, that defendant, Cook, having purchased the land in controversy after the construction of the railroad through it, took it subject to plaintiff's claim, I may remark there are several reasons why this is not so. In the first place counsel assume what nowhere appears and what is not true, that plaintiff had been claiming this land prior to the commencement of this suit; a like assumption is made, and with no better foundation, that plaintiff's claim to a right of way was all the time based on the proviso in section 1 of the land grant act; similarly, and with no more reason therefor, is it assumed that plaintiff's right of way rests exclusively on the congressional grant, and not upon condemnation proceedings or purchase of right of way by private contract. It is a fact as public and notorious as any fact can be—one of which this court will take judicial knowledge if it will of any historical event of this character, that nowhere from the commencement of the road at Junction City to its crossing the state line into the Indian Territory has plaintiff ever appropriated or claimed a right of way exceeding one hundred feet in width. The bringing of this action is the first declaration by plaintiff that it made any claim under section 1 of the land grant act, or that over any portion of its road, except for depots and water stations, did it ask for more than one hundred feet for a right of way. When plaintiff constructed its road all it asked any where was a strip one hundred feet in width as granted by section 6 of the act of July 26, 1866; and at that time, and all the time up to the bringing of this suit, it was understood every where that its claim was based on section 6 and not on section 1 of the congressional

grant. With this bold fact staring them in the face, it will not do for counsel now to assume and argue to this court that defendant bought with knowledge of the claim here made.

Another fact, known to all who lived there at the time, attested, too, by the records of the district court for the county where this land is situated, is that where the line of road as actually constructed differed from the line established by the Walker survey, plaintiff in many instances, if not in all, bought the right of way from the parties through whose premises the road ran.

Now, by what means plaintiff got the right to construct its road through the quarter section purchased of the Government by Hodges, we are not informed and need not conjecture. It is sufficient for the purpose of this case that there are several ways in which it might have been done without adopting the assumption made by plaintiff. Plaintiff may have purchased the one hundred feet which it occupies for a right of way, or Hodges may have given it to it, or Hodges may have conceded plaintiff's claim that it was entitled to the one hundred feet strip by virtue of section 6 of the congressional grant. But the indisputable fact is that plaintiff neither claimed, appropriated or in any way used a strip exceeding one hundred feet.

Plaintiff overlooks the fact that the burden rests on him to show title. All through their brief counsel assume that when the record is silent it is to be interpreted in its favor—they assume that when nothing is said, the fact or reference, whatever it might be, if shown, would speak in favor of plaintiff's claim. I maintain that the silence of the record is to be interpreted in defendant's favor—that

he has a right to keep still until plaintiff, by an affirmative showing, not by silence of the record, makes a case against him. If any presumptions are to be indulged in from silence it is that, if the fact, as it existed, was in its favor plaintiff, on whom rested the burden of proof, would have shown it.

The eighth item of the agreed facts reads:

"8. The quarter section, including the land in question, was entered and purchased by one W. A. Hodges from the Goverment of the United States, on October 9, 1869, and a certificate in due form was on that day, by the proper officers, issued to him therefor, and thereafter and on November 1, 1870, a patent in due form was issued therefor pursuant to said entry by the Government of the United States to said patentee, Hodges, which was duly signed and executed, and a perfect chain of title from said Hodges, patentee, now runs to and terminates in said defendant, J. B. Cook, and he is the owner thereof unless the same is owned by plaintiffs, by virtue of the facts herein admitted and the law governing the same."

With this fact admitted how can counsel say the record is silent as to whether or not Hodges was in possession of said land at the time of the construction of the road through it? How can he say that plaintiff had been in possession for more than 20 years? There has never yet been an hour when plaintiff was in possession of a foot of the land for which it sues, and never an hour since its entry from the Government when defendant or his grantors have not been in possession of it. Without full possession Hodges could not have entered the land from the Government. Actual occupancy of and residence on the premises for six months before one could purchase was required by the Joint Resolution of April 10, 1869, under which this land was entered.

Defendant's grantor being shown to be in rightful possession of the premises in controversy at the time of

and prior to the construction of the road through them, he is not bound to show more—it then devolves on plaintiff to show a termination of such rightful occupancy. The silence of the record on such a question is not against defendant but is fatal to plaintiff.

Defendant is not claiming any part of plaintiff's right of way, is not claiming any of the property ever in the possession of plaintiff, is not seeking to eject plaintiff from any of its premises, is not denying plaintiff's right to operate its road with the full right of way it has been occupying for twenty-five years. But defendant does object to giving plaintiff a piece of property to which it never made any claim of title till the commencement of this suit.

III.

Plaintiff claims a right of way based on the *proviso* in section 1 of the land grant act of July 26, 1866. By that provision the grant is conditioned on the President's approval of the line selected. That such approval was necessary was assumed if not decided by this court when the question of the validity of the land grant was here for determination in the two cases brought by the government against this plaintiff and the L. L. & G. R. R. Co. In the latter case Mr. Justice Davis, in discussing the applicability of the act to an Indian reservation, said :

"This fact was recognized, and the right of way granted through them subject to the approval of the President. There was no method of obtaining that right except through his negotiations with the Indians."

L. L. & G. R. R. Co. vs U. S. 92 U. S. (2 Otto) 733 (Bk. 23, p. 640).

The President's approval of the line selected is a condition precedent to plaintiff's right of occupancy. I do not concede that by inference, or in any other way, the matters which counsel argue under this head are before the

court. Stipulation 4 of the agreed facts says: "but the route of said road on its present location has never been approved by the President of the United States, unless such approval is shown by the other facts herein admitted." Now the only facts which are admitted are the building of the road and the issuance of Patents to the Company by the President. Perhaps, inferentially, it may be admitted that a report by the Governor, on which the right to the Patents would be founded, was made. The statute nowhere requires, what counsel say it does, that the Governor shall report the exact location of the road, or that his report shall be accompanied by a map showing the land over which the road was constructed. All that the statute requires is that "When the Governor of the State of Kansas shall certify that any section of ten consecutive miles of said road is completed in a good, substantial and workmanlike manner, as a first class railroad, then the said Secretary of the Interior shall issue to the said Company, patents," etc.

14 U. S. St. at L. 299. Sec. 3.

There is not a word there about any map, or definite location, or any thing of that kind; that is no part of the Governor's business—that has already been fixed by the Company's map filed with the Secretary of the Interior. The Governor is simply to ascertain and certify that the road has been built in the manner and of the materials making a first class road as required by the act. See opinion from which I quote elsewhere in this brief, in

Smith vs The N. P. R.R. Co. 58 Fed 513, 766 A 397, 19 U.S.A. 131.

It is not one of the agreed facts, nor is it before the court in any way, that the Secretary of the Interior made a report to the President on July 12, 1870, or at any other time, nor that the President approved such report, nor

that the President awarded to plaintiff the right of way through the Indian Territory. If these matters were before the court they certainly could not be accepted as evidence of the President's approval of the line built on. There is no evidence that the Secretary of the Interior had any report made to him by the Company, or by any one else, of any route except that shown by the Walker survey; therefore, it is to be presumed if he made a report to the President he reported the fact as it was shown in his office. If it is claimed that issuing Patents by the President to the Company was an approval of its route, then it must be of the route from which the lands were selected, and this, according to stipulation 4 of the agreed facts, was the Walker survey, and this did not touch the land in controversy. Nor could defendant's rights be affected by such an approval, if that was its effect, for it was not made till long after the purchase of the premises by Hodges.

There are many reasons which might be assigned why congress should insert the requirement that plaintiff's right of way should be subject to the President's approval. Having been placed in the act by congress this court will not undertake to say it was needless and that plaintiff shall be allowed to found rights, antagonistic to defendant's, on a grant without complying with the conditions precedent to its attaching.

In Stoddard vs. Chambers, 43 U. S. (2 How.) 284 (Bk. 11 p. 282) this court, in discussing the claims of a party under a government grant, said: "But it must be observed that a location, to come within the section, must have been made 'under a law of the United States.' Now, an act under a law, means in conformity with it; and unless the location of the defendant shall have been made

agreeable to law, or the patent were so issued, the reservation does not affect the title of the plaintiff." This same claim again coming before the court in the case of Mills vs. Stoddard, 49 U. S. (8 How.) 345, (Bk. 12 p. 1115) this court affirmed its former decision and said: "No right can be acquired under a law which is not in pursuance of it."

It certainly cannot be successfully contended that plaintiff's claim is in *conformity* with section 1, or that it is made in *pursuance* of section 1, for the right of way claimed has never received the approval of the President.

IV.

One of the principal questions in this case is, when was plaintiff's line located? Section 4 of the act under which plaintiff claims, provides as follows:

"That as soon as said Company shall file with the Secretary of the Interior maps of its line, designating the route thereof, it shall be the duty of said Secretary to withdraw from the market the lands granted by this act, in such manner as may be best calculated to effect the purposes of this act and subserve the public interest."

14 U. S. St. at L. 290.

The 4th of the agreed facts herein has this statement:

"Prior to the 24th day of December 1867, a line was surveyed for the route of said railroad, by G. M. Walker, then chief engineer of said Company, which was the line from which the lands mentioned in stipulation No. 7 herein were withdrawn from market, but that line did not touch * * the land described in plaintiff's petition in this case."

I submit that the survey of this line by Engineer Walker, and the filing of the map and profile thereof with the Secretary of the Interior, as authorized by section 4 of the land grant act, was a definite location of the line of the road, and that thereafter any one might settle upon, improve and purchase any portion of the government land,

free from any liability of having the same, or any portion thereof, taken from him by a change of route on the part of the plaintiff.

Before citing the authorities sustaining this view, I call attention to the distinction between the grant under which plaintiff claims and that to the Union Pacific R. R. Co. by act of July 1, 1862, and the one to the Northern Pacific R. R. Co. by act of July 2, 1864. By section 7 of the former act it is provided :

"That within two years after the passage of this act said Company shall designate the general route of said road, as near as may be, and shall file a map of the same in the Department of the Interior, whereupon the Secretary of the Interior shall cause the land within fifteen miles of said designated route or routes to be withdrawn from preemption, private entry and sale, and when any portion of said route shall be finally located, the Secretary of the Interior shall cause the said lands hereinbefore granted to be surveyed and set off as fast as may be necessary for the purposes herein named."

12 U. S. at L. 493.

The latter of said acts is similar to this : By section 6 provision is made for selecting the "general route" and the survey of the lands for forty miles in width on each side of the same, while section 3 grants the alternate section, in some instances for twenty and in others for ten miles on each side of the road "at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office."

13 U. S. St. at L. 367.

In both instances the withdrawal of the lands from the market upon the selection of the *general route* is from five to twenty miles greater in extent than the land grant which takes effect only from the *definite location* of the road ; this is evidently for the purpose of giving the Company a fair

margin for variation on account of the lay of the ground, or for other causes.

In United States vs M'Laughlin, 30 Fed. 147 the Union Pacific grant was construed: the distinction between the *general* and the *definite* location of the line was commented on and the court held that until its *definite* location the line might be changed, clearly implying that after such location no change could be made.

In construing the grant to the Northern Pacific Company, this court said:

"The act of Congress not only contemplates the filing by the Company, in the office of the Commissioner of the General Land-Office, of a map showing the definite location of the line of its road, * * * * but it also contemplates a preliminary designation of the general route of the road;" "The general route may be considered as fixed when its general course and direction are determined after an actual examination of the country or from a knowledge of it and is designated by a line on a map showing the general features of the adjacent country and the places through or by which it will pass."

"Nor is there anything inconsistent with this view of the sixth section as to the general route, in the clause in the third section making the grant operative only * * when a map of the definite location has been filed."

Buttz vs Northern Pacific R. R. Co. 119 U. S. 55 (Bk. 30 p. 336)
Ks. Pac. Ry. Co. vs Dunmeyer, 113 U. S. 629 (Bk. 28 p. 1124)

These preliminary maps, surveying the general location of the route, seem only to have been provided for in grants to companies that were to build long lines, through new and uninhabited country. They were never the lines from which the grants attached, but were authorized to notify all parties interested of the general course of the proposed route, and to prevent the conflict of claims that might otherwise arise.

Plaintiff's grant, like most of the grants of land through country that was partially settled and developed, made no provision for any preliminary line or map thereof.

The only map provided for at all to be filed by plaintiff is the one mentioned in section 4, above quoted, and it will be noticed that the one authorized by that section is a "map of its line, *designating the route thereof.*" Such line was surveyed by plaintiff's chief engineer, Walker, prior to December 24, 1867, and a map thereof was filed with the Secretary of the Interior, but this line did not touch the land in controversy: (agreed facts, number 4). I maintain that when this line was surveyed and the map thereof was filed with the Secretary of the Interior, plaintiff's route was *definitely fixed* and could not thereafter be changed to our detriment.

I think I am justified in saying this is the universal construction that has been placed on this act by the courts. In a controversy between the Kas. P. Ry. Co. and this plaintiff, the former claiming under the act of July 1, 1862 and supplemental and amenditory acts, and the latter, partially under prior but principally under act of July 26, 1866, the supreme court of Kansas, speaking through Mr. Justice Brewer, recognized the survey of the route as a definite location of the road.

K. P. Ry. Co. vs M., K. & T. Ry. Co. 15 Ks. 15.

It is true that in this case the question does not seem to have been raised as to what was a definite location, but the survey of the line was assumed to fix it. This case is not so clearly in point as those in the Federal courts hereinafter cited.

The land grant act of July 23, 1866 (14 U. S. St. at L. 210) is identical with the one of July 26, 1866 (p. 284 of same volume) under which plaintiff claims and the construction of the latter must be the same as that already given to the former. The former of these acts was

construed by the Cir. Ct. for the District of Nebraska, Justice Miller presiding, where is was said :

"I am of the opinion that, within the meaning of the 1st section of the act of congress of July 23, 1866 (chapter 212) granting land to the State of Kansas for the use and benefit of the St. Joseph and Denver City Railroad Company, 'the line or route of the road' was 'definitely fixed' when, on the 28th of March, 1870, a map of said location, adopted by the board of directors of the company, was received and filed with the Secretary of the Interior, as the law required."

Knevals vs Hyde, 5 Dill. 470, 6 Fed. Rep. 651.

This same act was subsequently before this court for construction and the rights of the parties depended on the time of the definite location of the route. The party claiming through the Company contended that the filing of the map with the Secretary of the Interior was the definite location of the road, while the other party claimed it was not fixed so as to affect other parties till the lands were withdrawn from the market. Mr. Justice Field, for the court said :

"We are of the opinion that the position of the complainant is the correct one. The route must be considered as 'definitely fixed' when it has ceased to be the subject of change at the volition of the Company. Until the map is filed with the Secretary of the Interior, the Company is at liberty to adopt such route as it may deem best, after an examination of the ground has disclosed the feasibility and advantages of different lines. But when a route is adopted by the Company and a map designating it is filed with the Secretary of the Interior and accepted by that officer, the route is established; it is, in the language of the act, 'definitely fixed,' and cannot be the subject of future change, so as to affect the grant, except on legislative consent. No farther action is required of the Company to establish the route."

Van Wyck vs Knevals, 106 U. S. (16 Otto) 360 (Bk. 27 p. 203.)

The court then proceeds to show that neither the Company, nor any other party could be prejudiced by what the Secretary should do or fail to do. The Company having done what the law required by filing the map of its

surveyed route, the rights of all parties in interest were thereby fixed.

And in reference to an alleged subsequent deviation from the surveyed line when the Company came to construct its road, the court farther said:

"As to the alleged deviation of the road constructed from the route laid down in the map, admitting such to be the fact, the defendant is in no position to complain of it; the lands in controversy are within the required limit, whether that be measured from one line or the other. A deviation from the route without the consent of congress, so as to take the road beyond the land grant, might, perhaps, raise the question whether the grant was not abandoned; but no such question is here presented. The deviation within the limits of the granted lands in no way infringed upon any rights of the defendant."

Defendant in the case at bar, however, is in a position to complain: he might not have been had the first as well as the last survey passed through his land. In that case, as in the case just cited, he would not have been injured by the deviation. But the line "definitely fixed" did not touch the land of defendant; after the location of that line, and prior to the location of any other, he purchased the land in controversy entirely free from any claim of plaintiff. After such purchase, without any additional grant from congress, plaintiff abandoned its original line as definitely located and attempted to locate a new line and to construct the same through defendant's premises; plaintiff was too late in making this claim. Plaintiff's rights had heretofore definitely attached to another line, and defendant's rights had in the mean time definitely attached to the land in controversy. For a recognition of this principle see:

W. & L. R. R. Co. vs C. D. A. Ry & Nav Co., 16 Sup. Ct. R. 231.

This same question of *definite location* came before this court again in a subsequent case and was decided in the same way. Justice Miller in delivering the opinion of the court said:

"For we are of opinion that under this grant, as under many other grants containing the same words, or words to the same purport, the act which fixes the time of definite location is the act of filing the map or plat of this line in the office of the Commissioner of the General Land Office. The necessity of having certainty in the act of fixing this line is obvious. Until then many rights to the land along which the road finally runs may attach which will be paramount to that of the company building the road. After this no such right shall attach, because the right of the company becomes by that act vested. It is important, therefore, that this act fixing these rights shall be one which is open to inspection. At the same time it is an act to be done by the company. The company makes its own preliminary and final surveys, by its own officers. It selects for itself the precise line on which the road is to be built, and it is by law bound to report its action by filing its map with the Commissioner, or, rather, in his office. The line is then fixed. *The company cannot alter it so as to affect the rights of any other party.* * * We concede, then, that the filing of the map in the office of the Commissioner is the act by which 'the line of the road is definitely fixed' under the statute."

Ks. Pac. Ry. Co. vs Dunmeyer, 113 U. S. 629 (Bk. 28, p. 1124).
Walden vs Knevals, 114 U. S. 373 (Bk. 29, p. 167).
Sioux City, etc. vs Griffey, 143 U. S. 32, 12 Sup. Ct., Rep. 363).

Still more recently the exact question involved in the case at bar was raised in and decided by the United States Circuit Court of Appeals for the Eighth Circuit, wherein the title to the land in controversy depended on the question as to whether or not the right of way when once *definitely fixed* by the filing of the map of the route with the Secretary of the Interior could thereafter be changed to the detriment of one who, in the mean time, had located on land through which such line did not pass. I will make a few quotations from the opinion in that case, nearly every word of which might with almost equal propriety be applied to the case we are now considering:

"That the grants of the *right of way* and of the lands in aid of the construction of this railroad were grants *in praesenti:* that they vested in the company the present right to the lands and *easements* thus

conveyed; that these grants were afloat and attached to no specific land until the line of the road was 'definitely fixed,' and that when the line of the road was 'definitely fixed' the selection of the lands and of the *right of way* was thereby made, and the right to lands and *easements* thus selected vested in the company as of the date of the approval of the charter, are propositions now too well settled to admit of discussion; (Authorities cited). It is also well settled that so far as the land grant is concerned the line of the railroad was 'definitely fixed' by the filing with, and acceptance by, the Secretary of the Interior of the company's map of its line of definite location. The company thereby exhausted its right of selection and so firmly anchored the land grant to this fixed line of its own choosing that it could not thereafter change or vary it without legislative consent so as to affect titles accruing thereunder or in any way affected thereby; (Authorities cited).

These decisions seem to be broad enough in terms and positive enough in language to settle the question here presented. But it is said that the question now before us involves the limits of a right of way and that the decisions referred to were rendered in cases involving land grants in aid of the construction of railroads. This is true, but it is not perceived how the line of this railroad can be consistently held to be definitely and unalterably fixed under the act of congress by filing its map of definite location and yet be subject to another and subsequent definite fixing on a different line by its actual construction, for this is simply to say that a line which is 'definitely fixed' is indefinitely changeable; nor is it perceived how this act of congress can be held to give the company the power to select and definitely fix one line of railroad for the purposes of its land grant and another and parallel line for the purposes of its right of way."

Smith vs The N. P. R. R. Co. 58 Fed. 513, 7 C.C.A. 307, 19 U.S.A. 131.

V.

It is the better doctrine, as recognized by the authorities, that a railroad company by once locating its road has exhausted its authority in that direction, and may not relocate it on a new line without special legislative authority so to do; and if such right is claimed it must clearly bring itself within the requirements of the law granting such right.

By an act of the legislature of Ohio a company was incorporated and authorized to condemn a right of way and construct a railroad, which it did. By the 12th section of the act, the company was authorized, under certain circumstances, to change the route first selected. In holding that without such special authority, and except under the conditions specified in the said section, the company could not change the line as originally located, the court said :

"The case stands thus: The corporators had the power to locate and construct a railroad. They could exercise this right but once without further grant. To accomplish this object a most important attribute of sovereignty was bestowed upon them by the legislature the extraordinary reserved power of subjecting the property of private individuals to a public use. If it was intended that this should be a continuing power, one that might be exercised and re-exercised again and again, as often as might suit the convenience of this company, the legislature should have so declared in express terms. They have not done so."

Morehead vs The Little Miami R. R. Co., 17 Ohio 351.

This company did change the line of its road and Naylor, whose property was damaged thereby, brought an action to recover for the damage sustained, whereupon the question came before the court again and in disposing of it the supreme court said :

"The charter of The Little Miami Railroad Company, like most charters of the kind, merely fixes a few points through which the road is to pass, from its commencement to its terminus, leaving the location of the road between the points specified to the discretion of the corporation. The location of a railroad through a settled country will always produce a great change in the use of the property along its track. Improvements are made in reference to the track as located. To change the track, in many instances, will produce as great damage to property as the making of a new road. The strip of country from which the road may select its track is frequently several miles in width. This extent of country is not all appropriated to the use of the road, but only so much

as may be necessary for a track; its right to it is simply one of selection, and when it has made its selection its right over all the other territory ceases. This principle is distinctly decided in the case of Morehead vs The Little Miami Railroad Company. It was there held that the railroad company having once located the road, their power to relocate, and for that prupose to appropriate the property of individuals, had ceased."

The Little Miami Railroad Company vs Naylor, 2 Ohio St. 238.

In Smith vs The N. P. R.R. Co., 58 Fed. 513, 7 C.C.A. 397, 19 U.S.A. 131, it is stated that by definitely locating its line of road "the company thereby exhausted its right of selection and so firmly anchored the land grant to this fixed line of its own choosing that it could not thereafter change or vary it without legislative consent * * ."

The following cases are understood to hold the same doctrine, but I have not had access to the reports to make a personal examination of what is decided, viz. :

Blackwood vs Glamorganshire Canal Co., 1 Moylne & Keene (English) 154;

Canal Company vs Blackmore, 1 Clark & Firmelly (English) 262;

State vs Turnpike Company, 10 Conn. 157;

Turnpike Company vs Hosmer, 12 Conn, 304;

L. & N. Turnpike Co. vs N. R. Turnpike Co., 2 Swan (Tenn.) 282; also 1 Redfield on Railways 410.

Plaintiff is a state corporation claiming rights under a national grant. To be entitled to the rights it claims in this case, it is not sufficient for it, were it able so to do, to show that it had legislative authority from the state to change the location of its line. It requires the sanction of congress to gain such right. Under the congressional grant it had one, and but one right of way. No authority for a change or a second location is there hinted at. Having exercised its right of location in 1867 its power, so far as acquiring government aid is concerned, was exhausted. Before any new right under any law, national or state, was attempted to be acquired by plaintiff, the rights of

defendant's grantor attached; it was then beyond the power of government to grant them away.

This question has been inferentially passed on at the present term of this court in the case of W. & I. R. R. Co. vs C. D. A. Ry. & Nav. Co., 16 Sup. Ct. R. 231, in which the right of a company that had, by mistake, filed a map of the wrong line (it having made three preliminary surveys) to thereafter construct its road on a different line, within the time when it might, under the statute, have filed its map, was recognized, as the rights of no other party were thereby affected. The language of the court is: "No reason is apparent why, instead of filing a second plat, it may not construct the road on the line surveyed and adopted, *so long as the rights of others have not intervened.*" Clearly the court means to be understood that if the rights of others had in the mean time intervened such change could not have been recognized.

The section of the Kansas statute which plaintiff's counsel quote in their brief, allowing railroad companies to change the location of their track did not take effect until October 31, 1868. The most that plaintiff could claim under any state law was that it could change its right of way, and by condemnation proceedings could acquire title to its new route notwithstanding its prior location. No statute would attempt to authorize—no statute *could* authorize it to take private property without compensation. Neither the State nor the Federal statute contemplated such a thing.

The general right to deviate from the line as first located is one thing; it is quite a different thing to claim a *free* right of way. If the right of way were acquired by purchase or condemnation proceedings instead of by

government grant, the right under the statute to change location, if it exists, as plaintiff claims it does, would enable it to select a new route, but it would be compelled, nevertheless, to obtain anew, and pay for, the right of way it then proposed to occupy. The congressional grant, in this case, was of but one right of way; that, plaintiff obtained by the Walker survey. If it had a right to relocate its road under the state statute, it could only get a right of way by purchase or condemnation proceedings, and the payment therefor to the then owner of the premises appropriated. None of the authorities cited by counsel assert any greater right than this: the Iowa case expressly concedes this point.

Congress proposed to grant plaintiff one right of way through the *public* lands; this it got under the Walker survey. When this was done defendant's grantor had a right to, and did purchase the land in dispute free from any right of way. Thereafter neither Congress nor the State Legislature could take it from him without compensation. Either might, perhaps, allow the route to be changed, but only on condition of the company's acquiring the property by condemnation proceedings and payment for damages sustained; it is not claimed that anything of this kind took place.

I have but little to say in reference to the authorities counsel cite on this branch of their argument. Of course counsel did not intend to misstate the facts in reference to the case of A. T. & S. F. Ry. Co. vs Mecklin, 23 Ks. 168, from which they quote in their brief, on p. 20, and of which they say: "There was a deviation of several miles." The fact, as stated by the court in the opinion from which counsel quote, and on the preceding page, is "that while

the road through ranges 14 and 15, west, in Barton county, was not finally built exactly on the route surveyed in 1870, the changes were slight—in some places ten feet or twenty feet, and in some places perhaps a hundred feet; and that these changes were principally made in the actual construction of the road, for the purpose of getting crossing at streams at right angles with the course of streams." It looks like trifling to cite such changes as these as authority for the claim made in the case at bar.

In the case of The Cent. Pac. Ry. Co. vs Dyer, 1 Saw. 641, 5 Fed. Cases 364, No. 2552, which counsel say "practically held that the company was not bound to construct its road upon the line designated in the map, but might deviate therefrom within the limits of the land grant," the court was referring to the line of preliminary survey, designating the "general route" of the road; the question there decided has not the remotest bearing on the point at issue here.

In reference to The D. & R. G. Ry. Co. vs Alling, 99 U. S. (9 Otto) 463 (bk. 25, p. 438), from which counsel quote, without going into details it is, perhaps, sufficient to say, there is nothing in that decision in conflict with our contention in this case. The language of the opinion, when applied to the facts in the case, cannot be made to support plaintiff's claim here. The location spoken of in that case was of a short distance, perhaps less than a mile, in a long distance extending over hundreds of miles.

Counsel argue that there is nothing in the record showing that any stakes were set or mounds raised so that defendant's grantor, Hodges, could have any knowledge of the Walker survey. I submit that when it is shown the line was surveyed and a plat thereof filed with the Secretary

of the Interior, the natural presumption follows that those things were done which are usual in such cases; making and filing a map of the location necessarily carries with it the designation, in some appropriate way, of the line so that any one interested may know where it is. If a party could not find the line from visible monuments on the ground, either because they had not been placed there or had been destroyed, he could find through what section and part of the section it ran by consulting the map.

But more than this, Hodges, and every one else settling on and claiming any portion of these lands, was bound to know the location of the road; the law conclusively presumes that every person has such knowledge. The map is made and filed to give such information and a party neglects to acquire it at his peril. The law will not permit him to say he did not know what the public records show.

VI.

The patent issued to defendant's grantor for the full quarter section of land including the premises in controversy, without any reservation, as shown by number 8 of the agreed facts, conclusively presumes that the land department found all the facts to exist on which such patent issued. One of these facts was that plaintiff's right of way did not extend through said quarter because theretofore it had been definitely located through other premises. This patent, while issued after the construction of the road, relates back to the entry of the land by the patentee, which was before the construction of the road and after the survey by Engineer Walker. The land officers therefore necessarily found that this quarter was not subject to plaintiff's claim for a right of way because its route was

already definitely fixed elsewhere. This is a finding of fact within the jurisdiction of the land department and is therefore conclusive. A like conclusion must be reached from the action of the President in issuing patents to plaintiff for the odd sections. These patents were based on the survey of the line by plaintiff's chief engineer, Walker, prior to Dec. 24, 1867, as shown by number four of the agreed facts (p. 5); a necessary fact to authorize these patents was that the railroad had been definitely located on said route, and said patents are conclusive that such fact existed.

By Act of Congress, lands reserved to Creek Indians were subject to sale, after abandonment, on order of the Secretary of the Treasury. In passing on the validity of such a sale this court said:

> The 6th section of the Act of 1817 provides that no land reserved, to a Creek warrior should be offered for sale by the Register of the Land Office, unless specially directed by the Secretary of the Treasury. Both by the Treaty and the Act of Congress, it was declared that if the Indian abandoned the reserved land, it became forfeited to the United States. The fact of abandonment the Secretary was authorized to decide, and if he did so find, he might then order the land to be sold as other public lands. The rule being that the patent is evidence that all previous steps had been regularly taken to justify making the patent; and one of the necessary previous steps here being an order from the Secretary to the Register to offer the land for sale, because the warrior had abandoned it, we are bound to presume that the order was given. That such is the effect, as evidence, of the patent produced by the plaintiffs, was adjudged in the case of Bagnell vs Broderick, 13 Pet. 450, and is not open to controversy anywhere."
>
> Minter vs Crommelin, 59 U. S. (18 How.) 87 (Bk. 15, p. 270.)

"The survey, by that officer, of the grant, and the application of land to its satistaction, as thus prescribed, could, undoubtedly, have been disapproved by the Commissioner of the General Land Office, and had their correctness been contested they might have been treated as inoperative until approved. But the approval by that officer, when given, took effect by relation as of the date when the survey and

appropriation were made. They must be held valid from that time, so as to protect proceedings taken in accordance with them."

"But, independently of this conclusion, there is a general answer to the alleged erroneous rulings of the officers of the Land Department, as grounds for the interference of the court. Those rulings were upon mere matters of fact, or upon mixed questions of law and fact, which were properly cognizable and determinable by the officers of that department."

Quinby vs Conlan, 104 U. S. (14 Otto) 420, (Bk. 26, p. 801.)

"A patent, in a court of law, is conclusive as to all matters properly determinable by the Land Department, when its action is within the scope of its authority; that is, when it has jurisdiction under the law to convey the land. In that court the patent is unassailable for mere errors of judgment. Indeed, the doctrine as to the regularity and validity of its acts, when it has jurisdiction, goes so far that if any circumstances under existing law a patent would be held valid, it will be presumed that such circumstances existed."

St. Louis S. and R. Co. vs Kemp, 104 U. S. (14 Otto) 636 (Bk. 26, p. 878.)

In the two cases from 104th U. S. last cited and quoted from, the opinions delivered by Mr. Justice Field contain a discussion of the construction and duties of the Land Department, and of the effect of the acts of those officers, pertinent to the question now under consideration.

The Circuit Court of Appeals, from whose opinion I have already quoted, in disposing of the claim that the acceptance of the road by the officers appointed by the land grant act to examine it when completed, was an approval of the right of way built on, said:

"The question they were authorized to consider and determine was whether or not the railroad and telegraph line were constructed in a substantial and workmanlike manner so that they would be serviceable for the purposes of their construction, whether they were 'ready for the service contemplated,' not whether the title of the company to the lands on which they were constructed was obtained by the grant of the right of way, or by the exercise of the power of eminent domain, or had not been obtained at all. Moreover, if there were any commissioner or

tribunal charged with the duty of determining the question now presented, it was the Commissioner of the General Land Office, and his issuance of the patent to the land in dispute to the plaintiff's grantor without any reservation of the right of way to the defendant would be a conclusive adjudication that these lands were not subject to any such right of way;" (citing the two cases above referred to from the 104th U.S.)

Smith vs The N. P. R.R. Co. 58 Fed. 513, 7 CCA 397, 19 U. S. A. 131.

VII.

Plaintiff's route having been definitely located for one purpose was definitely located for all purposes; it was as much to protect the rights of defendant in purchasing land through which it did not run as it was to secure a right of way to plaintiff in land through which it did run. In a case from which I have already quoted, the court said:

"Why was this delay contemplated, and why was the line of the railroad required to be 'definitely fixed' by a public record made and filed by the Company? In our opinion there were at least three objects to be accomplished by the filing of this map: First—That there might be a public and permanent record of the fixed line of this railroad and thus of the *limits of the right of way;* Second—That the definite location of the line of the railroad might be known to the Secretary of the Interior and furnish the call for his adjustment of the land grant; and Third—That the date of the filing of this map might furnish a date for the determination of the validity of preemption, homestead and other rights." "But the main purpose of requiring this line to be definitely fixed was not only to furnish a call for the land grant, but also to provide a permanent record of the line of the railroad and *the limits of this right of way.*" "Congress intended that the engineers of the Company should have ample opportunity to carefully survey the practicable lines of construction along the general route, * * and when all this was done that the Company should definitely fix its line of railroad, that it should irrevocably choose, and by filing its map of definite location announce its choice of the line on which it elected to construct its road and along which it would exercise its right of way." "This selection was made by its own officers in its own time, after every opportunity had been offered it to make satisfactory choice and we think it exhausted the right of selection given by the Act of Congress and definitely and

irrevocably fixed the line of this railroad and *the limits of the right of way* to it as against third parties holding under patents of the United States."

Smith vs The N.R.R R. Co. 58 Fed. 513, 7 C.C.A. 397, 19 U.S.A. 131.

The court then discusses at some length the effect of the approval of the road as built and the issuance of patents to the land and hold that such approval could have no effect on the Company's claim to a right of way, and conclude that branch with these remarks :

"It is unnecessary to consider in this case what effect, if any, the action of the commissioners who examined this railroad and of the President who approved their report would have if the question regarding this right of way arose between the Company and the United States alone, and we express no opinion upon that question. But as against this plaintiff holding under a patent issued by the United States to his grantor without any reservation, when the public record made by the Company of the definite location of its line two miles south of this land remained unchanged and without amendment, we are clearly of the opinion that such action was without any effect."

Smith vs The N. P. R.R. Co., Supra.

After the location of the Burlington and Mo. River R. R. in 1865, under act of July 2, 1864, Congress passed the act of August 1870, authorizing the Company to change the location of its road as originally surveyed and located, restricting it, however, to the limits of the land grant which was to be controlled by the first line located. After the passage of the act authorizing a change of route and before the change made in pursuance thereof, a party in Nebraska purchased a quarter section which the original line did not touch. When the line was subsequently changed it passed diagonally through this quarter. The Supreme Court of Nebraska, by a divided bench, held that any one purchasing land, after the passage of the Amenditory Act authorizing a change of route, took it subject to the Company's right of way through it, provided on a relocation it chose to put

the line there, to the same extent as he would have taken it after the passage of the original act and before the definite location of the road. The plaintiff contended that after the definite location of the road as originally made he could purchase any where free from liability of right of way. In denying this claim, the court used this language:

"If the plaintiff had acquired the government title to the land after the first location of the road, and before the passage of the act authorizing a change, there would be great strength in the position here taken."

Rider vs. B. & M. R. R. Co., 14 Neb. 120, 15 N. W. 371.

In the case at bar Congress never gave plaintiff any authority to change the route as originally located. Defendant acquired title after the definite location of plaintiff's line, and before it had done any thing towards attempting, even, to gain rights elsewhere. It cannot be possible that it could thereafter come in and take defendant's land without compensation.

VIII.

It will be noticed by the opinion found in the record that the Supreme Court of Kansas did not pass on the defense of the statute of limitations interposed by defendant, although it was raised in the trial court, because having decided the other points in defendantt's favor, a decision of that question was not necessary. I submit that were there no other defense to plaintiff's recovery, the bar of the statute of limitations is absolute. Paragraph 4093 Gen. Statutes of Kansas, 1889, provides that actions of this character can only be brought within fifteen years from the time the cause of action accrued. Plaintiff's right, if any existed, could not have accrued later than the time of the construction of its road, which was prior to June 6, 1870 (No. 4 of agreed facts). Plaintiff

commenced this action by filing its petition in the District court, on August 17, 1887. (Printed record p. 3.) It will thus be seen that more than seventeen years elapsed between the time of the accruing of its right of action, if it had one, and the time of its commencement of this suit.

There can be no doubt that the question is properly raised by the pleadings. Plaintiff's petition is drawn under sec. 595 of the Kansas code, and defendant's answer under the following section, which provides:

"It shall be sufficient in such action if the defendant, in his answer, deny, generally, the title alleged in the petition."

Ch. 80, sec. 596, par. 4669 Gen. St. 1889.

"This was an action in the nature of ejectment, commenced under section 595 of the code. * * * The answer of the defendant was a general denial. Under such answer we think the defendant had a right to show, by any legal evidence that he might have had, that he was the owner of the property in controversy."

Hall's Heirs vs. Dodge, 18 Ks. 270.

"It may be remarked that all the matters alleged in the second, third and fourth defenses could have been given in evidence under the mere denial of the first defense. For the statute provides that in these actions it is sufficient for the defendant to deny generally the title alleged in the petition."

Wicks vs. Smith, 18 Ks. 514.

"We remark, second, that possession with claim of ownership is not only evidence of title, but it is of itself title in a low degree; the proof of possession for more than fifteen years under a claim of title is sufficient evidence to sustain a judgment in ejectment against one laboring under no disability and claiming under no title derived from the plaintiffs or their grantors. In other words, as fifteen years' possession under claim of title is, generally speaking, by the statute of limitations a bar to an action brought by one under no disability, proof of such possession is sufficient evidence of title."

Hollenback vs. Ess, 31 Ks. 88.

From the facts admitted, the presumption is inevitable that defendant and his grantors have been in peaceable possession of the premises in controversy since October